GENERAL STATUTORY RULES AND ORDERS.

VOLUME II

(1841—1889)

… … ed that running … the Calcutta … Similarly, the Allahabad High Court has held that water when conveyed in pipes and so reduced into possession can be the subject of theft[3].

Animals.—In order to render an animal *feræ naturæ* the property of any person there must be a complete capture, the result of which is to reduce the animal completely into possession. Mere pursuit short of capture will not do, and so long as it is possible for the animal to escape it cannot be said that there is such a reduction into possession as makes the animal property of the pursuer[4].

Bull.—A bull dedicated to an idol and allowed to roam at large remains the property of the trustees of the temple, and can become the subject of theft[5]; but not a bull set at large in accordance with religious usage[6].

Peacock.—A peacock tamed but not kept in confinement is the subject of theft[7].

Fish.—Fish in an ordinary open irrigation tank[8], or in a tank not enclosed on all sides but dependent on the overflow of a neighbouring channel[9]; or in a public river or creek, the right of fishing in which has been let out[10], are *feræ naturæ* and not the subject of theft. But fish taken at sea are in the possession of the owner of the smack by which they are taken, as soon as they are taken, and are consequently the subject of larceny[11]. Similarly, fish in an enclosed tank are restrained of their natural liberty and liable to be taken at any time according to the pleasure of the owner, and are, therefore, the subject of theft[12]. The test of possession is, whether the fish could escape. If they are unable to escape, they become the subject of theft[13].

But *chanks* (popularly included among shell-fish, but really large molluscs) are held to be the subject of theft as licenses to gather them are granted by the Sovereign[14]. The word 'fish' is, according to an English case, not confined to vertebrates but includes a winkle. Shell-fish are included in the word 'fish'[15].

Cattle.—The removal of animals grazing in open lands where the owner has driven them is theft[16]. The illegal seizing of cattle and taking them to the pound is not theft[17]. A person who steals cattle which are let loose by the owner with a … theft[18].

… latter, either himself or by his duly authorised agent, is entitled t…

1 *Sheikh Arif*, (1908) 35 Cal. 437.
2 *Chockalingam Pillai*, [1912] M. W. N. 119, 11 M. L. T. 162.
3 *Mahadeo Prasad*, (1923) 45 All. 630.
4 *Raghunandan*, (1912) 15 O. C. 183.
5 *Nalla*, (1887) 11 Mad. 145. In this case the …

… an extent that both the supply and distribution channels are dry, the freedom of fish is circumscribed and the catching of such fish …

(1888) 15 Cal. 402 … *ar Dome*, (1888) 15 …
10 *Bhaguram Dome v.* …

… 36 Mad. 472. … *Muthupayal*, (1904) …
14 *Annakumaru Pillai v.* … *ord Advocate*, [1904] 27 Mad. 551, *Parker v. L* … A. C. 364 … 5) 25 Cox 44.
15 *Leavett v. Clark*, (191 … 4 Bom. L. R. 626;
16 *Karsan Bapu*, (1902) … 19 of 1879; *Nga Kasim*, (1879) P. R. No … R. (1892-1896) 238. *Thein O*, (1893) 1 U. B. … C. W. N. 228n.
17 *Jhaman Lal*, (1906) … p. Cr. C. 136.
18 *Lakshmya*, (1878) Unr …

[illegible]

3. **'Out of the possession of any person'.** No definition is given in the Code of the word 'possession', though it is said that property in the possession of a person's wife, clerk or servant, on account of that person, is in that person's possession (s. 27). Stephen[6] says: "A movable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need". The authors of the Code remark: "We believe it to be impossible to mark with precision, by any words, the circumstances which constitute possession. It is easy to put cases about which no doubt whatever exists, and about which the language of lawyers and of the multitude would be the same. It will hardly be doubted, for example, that a gentleman's watch lying on the table in his room is in his possession, though it is not in his hand, and though he may not know whether it is on his writing-table or on his dressing-table. As little will it be doubted that a watch which a gentleman lost a year ago on a journey, and which he has never heard of since, is not in his possession. It will not be doubted that when a person gives a dinner, his silver forks, while in the hands of his guests, are still in his possession; and it will be as little doubted that his silver forks are not in his possession when he has deposited them with a pawnbroker as a pledge. But between these extreme cases lie many cases in which it is difficult to pronounce, with confidence, either that property is or that it is not in a person's possession...For the purpose of preventing any difference of opinion from arising in cases likely to occur very often, we have laid down a few rules...which we believe to be in accordance with the general sense of mankind as to what shall be held to constitute possession (s. 27) ...Much uncertainty will still remain. This we cannot prevent...The provision contained in clause 61 (s. 72) will, we think, obviate all the inconveniences which might arise from doubts as to the exact limits which separate theft from misappropriation and from breach of trust. The effect of that clause will be to prevent the judges from wasting their time and ingenuity in devising nice distinctions. If a case which is plainly theft comes before them, the offender will be punished as a thief. If a case which is plainly breach of trust comes before them, the offender will be punished as guilty of breach of trust. If they have to try a case, which lies on the frontier, one of those thefts which are hardly distinguishable from breaches-

1 *Arju Routra*, (1924) 3 Pat. 549.
2 (1869) 4 M. H. C. App. 20.
3 *George Brooke*, (1829) 4 C. & P. 131.
4 *Cheafor*, (1851) 5 Cox 367.
5 *Shickle*, (1868) L. R. 1 C. C. R. 158; *Corn...* (1864) 10 Cox 23; *Head*, (1857) 1 F. & F. 350; *Garnham*, (1860) 2 F. & F. 347.
6 Digest of Criminal Law, Art. 306.

of trust, or one of those breaches of trust which are hardly distinguishable from theft, they will not trouble themselves with subtle distinctions, but, leaving it undetermined by which name the offence should be called, will proceed to determine what is infinitely of greater importance, what shall be the punishment"[1].

The property must be in the possession of the prosecutor[2]. Thus, there can be no theft of wild animals, birds, or fish while at large, but there can be a theft of tamed animals. Similarly, where property dishonestly taken belonged to a person who was dead, and therefore in nobody's possession, or where it is lost property without any apparent possessor, it is not the subject of theft, but of criminal misappropriation (*vide* ill. (*g*).) Where the owner of bullocks had lost them and could not find them on search and the bullocks were found in the possession of the accused, it was held that they could not be convicted of theft but of criminal misappropriation[3]. Where the accused removed some bricks from a heap which had been left lying for eight years, it was held that it was open to the assumption that the bricks had been abandoned and their removal under the circumstances did not constitute theft[4].

Possession of a trustee[5], or a bailee[6], is a sufficient possession within the definition of theft

In a Bombay case it is said that to constitute theft it is sufficient if property is removed, against his wish, from the custody of a person who has an apparent title, or even a colour of right, to such property[7] In this case the accused owed the complainant Rs 60, and during the accused's absence his wife sold his working implements to the complainant for Rs 25 of the debt. On accused's return he took back the implements against the wish of the complainant's wife, complainant himself not being present The Magistrate thereupon convicted the accused of theft. But the Sessions Judge referred the case to the High Court on the ground that the offence of theft was not committed because it was not proved that the accused intended to act dishonestly in taking the implements nor was there evidence [illegible]
[illegible]
[illegible]
[illegible]
the accused made himself liable to a suit for damages by taking the law into his own hands, but as his act in taking away the property was not proved to be a dishonest one within the meaning of ss 24 and 378 he can hardly be said to have committed theft. In a Calcutta case the accused alleged that certain paddy was grown upon his *jote*, and that he cut and removed it as a matter of right and in an assertion of a bona fide claim to the land The complainant admitted that there had been a boundary dispute between his landlord and the landlord of the accused, but claimed the paddy as his own as the land was in his possession It was held that the accused had no justification in taking the law into his own hands, even if he was entitled to hold the land because he was not in actual possession of it[8]. Where certain trees which were the subject of the charge of theft stood on the holding in the possesson of the accused, it was held that the charge of theft could not stand because the offence of theft was an offence against possession[9].

A bailee entrusted with an article to repair has no lien over it, if he has not completed the repairs within the stipulated time; or when time is not of the

1 [illegible]
2 [illegible]
3 [illegible]
4 [illegible]
5 [illegible]
6 [illegible]

7 [illegible] 135. [illegible] *Pandita* [illegible] *Chandra Roy* v. *Rakulal Chandra Roy*, (1899) 4 C. W. N. 190. See *Bullara Gowd*, (1897) 1 Weir 426.

9 *Sheikh Garib Haji*, (1925) 30 C. W. N. 359.

essence of the contract, within a reasonable time, and he cannot refuse to part with it, after doing a certain amount of work, till payment for such work, in the absence of an agreement to receive part payment for the work done; and the owner is entitled, in the circumstances, to recover his article without payment for the same. Where an electric kettle was given to a repairer for repairs, and he did not complete the work within the stipulated period, or even within a reasonable time thereafter, and the owner forcibly removed the article from the repairer's shop, without payment of the sum demanded by the latter for work already done to it, it was held that the owner was not guilty of theft, as his intention was not to cause wrongful loss to the repairer, or wrongful gain to himself, but to recover his property after the lapse of a reasonable time[1].

There may be theft without an intention to deprive the owner of the property permanently. In this respect the Penal Code differs from the English law. Where, therefore, a person snatched away some books from a boy as he came out of school and told him that they would be returned when he came to his house, it was held that he had committed theft[2].

'Any person'.—For the definition of the word 'person' *see* s. 11, *supra*. The person from whose possession the property is taken may or may not be the owner of it and may have his possession either rightful or wrongful. Mere physical control of the person over the thing is quite enough (*vide* ills. (*j*) and (*k*).)

Attachment.—It has been held that theft can be committed by the owner of a crop under attachment by removing it[3]. Here the attachment was by distraint made by a Revenue Court, and the mode and effect of attachment by a civil Court as regards possession was not considered. Hence, where a judgment-debtor, whose standing crops were attached, harvested them while the attachment was in force, it was held that he would not be convicted of theft but of offences under ss. 424 and 403[4]. The mere cutting and removal of a crop under attachment do not constitute the offence of theft without proof of dishonest intention. Such intention is negatived where the removal was in order to save the crop from being washed away[5], or was in the nature of distraint by a landlord after it was attached[6].

Goods in the shop of the accused were attached in execution of a decree and the decree-holder himself was given possession of the goods on his executing a security bond for the production of the goods when called upon to do so. The accused put in a claim to the goods and the claim was allowed. But the accused without taking delivery of the goods through the Court broke open the lock during the decree-holder's absence and removed the goods. It was held that as the accused only removed his own goods, there was no dishonest intention to cause loss to the complainant or gain to himself, and hence there was no theft[7].

Where property has been taken possession of by a receiver in insolvency in the bona fide belief that it is property belonging to the insolvent, any person who takes such property from the possession of the receiver is guilty of theft, even though he may claim to be the owner thereof[8].

Accused having failed to pay a *takawi* advance, his property was attached, but the attaching officer had not with him, at the time of the attachment, a warrant of attachment: the property was subsequently ordered to be sold when it was discovered that the accused had removed it, he accordingly was placed on his trial and convicted under this section. It was held that as the attaching officer had

1 *Judah*, (1925) 53 Cal. 174.
2 *Naushe Ali Khan*, (1911) 34 All. 89.
3 *Periyannan*, (1883) 1 Weir 423; *Dadala, Atchigadu*, (1881) 1 Weir 420; *Chunnu*, (1911) 8 A. L. J. 656.
4 *Obayya*, (1898) 22 Mad. 151. See also *Subbaiya*, (1882) 1 Weir 421. Cf. *Ramasami*, (1892) 16 Mad. 364.
5 *Pedda Maddulega*, (1892) 1 Weir 423.
6 *Ram Dayal*, (1915) 38 All. 40.
7 *Lakshminarayana Chettiar*, (1922) 16 L. W. 15, 42 M. L. J. 490.
8 *Kamla Pat*, (1926) 48 All. 368.

not with him the warrant there was no valid attachment and, consequently, the accused was not guilty[1].

Possessory order.—The order of a Mamlatdar in a possessory suit is operative

f such an order passed

standing thereon was

the crops, it was held

The accused were convicted of having committed theft of paddy belonging to the complainant. It appeared that some months previous to the occurrence there had been an order under s 145 of the Criminal Procedure Code in favour of the complainant in respect of the land in question. It was held that the order under s. 145, Criminal Procedure Code, only showed that the complainant was in possession on the date of the order. It was only a piece of evidence to be taken into consideration in determining who was in possession. It was open to the accused to show that in spite of the order they were actually in possession or regained possession after the order and that they grew the crops and were in possession on the date of the occurrence, the title of either party to the land in question being wholly irrelevant in relation to the charge of theft[3].

Joint possession.—Where there are several joint owners in joint possession, and any one of them dishonestly takes exclusive possession, he will be guilty of theft[4]. Similarly, if a co-parcener dishonestly takes the separate property of another co-parcener, he will be guilty of theft[5].

Cases.—Taking out of the possession of another person.—The complainant washed a carpet at the village tank and hung it up there to dry; the accused dishonestly took the same away. It was held that the carpet had never left the complainant's possession, and the offence committed was that of theft[6].

Where certain trees were uprooted by a dust-storm and were removed by tenants, it was held that the removal caused wrongful loss to the Zamindar and wrongful gain to the tenants and that they were therefore guilty of theft[7]. Accused Nos. 2 and 3 having made a default in the payment of land revenue, the Mamlatdar proceeded to their houses and made a *panchnama* declaring their buffaloes to be under attachment. At the instigation of accused No. 1, the other accused untied and removed the buffaloes. It was held that they were guilty of theft for the Mamlatdar was to be deemed to be in possession inasmuch as he had a statutory right to take possession, he came to the place where the buffaloes were with the intention of taking possession, he made a declaration and a *panchnama*

i by forbidding

to bring goods to his house, took out a certain quantity, asked their price, separated them from the rest, and then sent the tradesman home on pretence of wanting other articles, and ran away with the goods, it was held that this amounted to larceny[9]. Getting

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dubi

Ghose, (1927) 31 C. W. N. 904

4 (1880) 1 Weir 408; *Virankutti* v. *Chiyamu*, (1884) 7 Mad. 557; *Kala*, (1889) P. R No. 12

occupancy tenant and had cut and removed the crops, but the Court held that the landlord must be deemed to be part owner and in possession and could not be convicted of theft. It may, however, be observed that even a part owner has no right to take away the portion of the other part owner. The facts in the report are meagre.

5 *Sita Ram Rai*, (1880) 3 All. 181.

6 *Mathi*, (1886) Cr. R. No. 70 of 1886, Unrep. Cr. C. 314.

7 *Dunyapat*, (1919) 17 A. L. J. 974, 1 U. P. L. R. 133

8 *Lallu Waghji*, (1918) 43 Bom. 550, 21 Bom. L. R. 251, 5 Bom. Cr. C. 5.

9 *Sharpless*, (1872) 2 East P C 675..

goods delivered into a hired cart on the express condition that they would be paid for before they were taken out from the cart, and then getting them from the cart without paying the price was held to be larceny[1]. The accused put his hand into the prosecutor's pocket, got hold of his purse, and pulled it up to the edge of the pocket when the corner caught on a belt worn by the prosecutor. The prosecutor at that moment grasped the purse and put it back. It was held that the accused was guilty of larceny. Pickford, J., said: "If a man put his hand into another's pocket, and removed a purse from the position in which it was to the edge, and was only prevented from getting full possession of it because it accidentally caught in the belt, there was a sufficient asportation to constitute larceny"[2].

Joint property.—The removal of even the whole of the crop by a ryot in a zamindari holding on a *varam* tenure without delivering to the Zemindar his share of the crop does not constitute theft[3]. A had in her possession forty baskets of paddy out of which B was entitled, under a decree of a civil Court, to thirty-five baskets. The decree awarded her this specific paddy as being the produce of a specified farm. B took the thirty-five baskets of paddy out of A's possession without A's consent. It was held that the act of B, though irregular and improper, did not amount to theft[4].

English cases.—H, a member of a friendly society, was in possession of a shop where goods were sold for the benefit of the society. Each member partook of the profit, and was subject to the loss arising from the shop. H had the sole management, and was answerable for the safety of all the property and money coming to his possession in the course of the management. The accused, also a member of the society, assisted in the shop without salary, and was indicted for stealing money from the till. It was held that he could be convicted of larceny although a member of the society[5].

4. **'Without that person's consent'.**—The thing stolen must have been taken without the consent of the person in possession of it. The primary inquiry to be made is whether the taking were *invito domino*, or without the will or approbation of the owner. Hence, where a debtor gave certain property to his creditor, and subsequently found out that the debt was time-barred, it was held that the charge of theft could not be sustained against the creditor, inasmuch as there was a full unqualified consent on the part of the debtor at the time of his giving away the property[6]. Explanation 5 says that consent "may be expressed or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied" (*vide* ills. (*m*) and (*n*)). But a consent given under improper circumstances will be of no avail (*vide* ill. (*o*)). As to what is a valid 'consent' see s. 90, *supra*.

Cases.—A sought the aid of B with the intention of committing a theft of the property of B's master. B, with the knowledge and consent of his master, and for the purpose of procuring A's punishment, aided A in carrying out his object. It was held that as the property removed was so taken with the knowledge of the owner, the offence of theft was not committed, but A would be guilty of abetment of theft[7]. Really speaking the owner did not consent to the dishonest taking away of the property. He merely assisted the thief in carrying out the latter's dishonest intention: cf. ills. (*m*) and (*o*). The thief had no knowledge of the owner's act, and it cannot, therefore, be construed as a consent. In two English cases, on

1 *Samuel Pratt*, (1830) 1 Mood 250.

2 *Taylor*, (1910) 27 T. L. R. 108, 109.

3 *Subudhi Rantho* v. *Balaram Pudi*, (1902) 26 Mad. 481; *Annamalai Odayar*, [1914] M. W. N. 106; *Sankaranarayana Iyer*, [1914] M. W. N. 483.

4 *Maung Po*, (1902) 1 L. B. R. 334.

5 *William Webster*, (1861) 9 Cox 13; *William Burgess*, (1863) 9 Cox 302; *William Cain*, (1841) 2 Mood. 204.

6 *Musammat Piari Dulaiya*, (1904) 1 A. L. J. 508.

7 *Troyluckho Nath Chowdhry*, (1878) 4 Cal. 366. See *Benjamin Bonnen*, (1844) 1 C. & K. 295, 301.

similar facts, the offence of larceny was held to have been committed. The owner of goods, knowing of an intention in the accused to steal them, they having plotted so to do with his servant, directed his servant to carry on the business with a view to the detection of the thieves. The servant with the consent of his master agreed with the accused to open the door of the house and let them in. They broke open inner apartments and took the goods. It was held that they were guilty of larceny[1].

The accused suggested to a servant of the prosecutrix a plan for the commission of a robbery by the accused at the shop of the prosecutrix. The servant, pretending to agree to the accused's suggestion, lent the keys of the shop to the accused, who made duplicate keys, with one of which, on a day arranged with the servant, the accused unlocked a padlock attached to the outer door and entered the shop where he was arrested. The prosecutrix had been informed by the servant of the accused's plan and knew that he intended to enter the shop on the day in question. The accused was convicted on an indictment which charged him with having broken and entered the shop with intent to steal therein It was held that the conviction was right, notwithstanding that the prosecutrix knew that the accused had been supplied with the means of breaking and entering by her servant[2]. Removal of official papers without the consent of the official head amounts to theft. A Government *tumar* (correspondence), in which accused Nos. 2 and 3 were interested, was kept by the Mamlatdar at the house of a clerk During the absence of the clerk from his house, accused No 1, the record clerk, in the Mamlatdar's office, removed the *tumar* without anybody's consent In the company of the accused Nos 2 and 3 he went with it to a neighbouring town to show it to the pleader of accused Nos. 2 and 3 in connection with some proceeding. There accused No 1 left the *tumar* with the pleader, and went about the town for some time on his own errand. Later he brought the *tumar* back and stealthily replaced it from where it was taken It was afterwards discovered that some papers had disappeared from the *tumar*, whilst others had either been mutilated or altered It was held that accusd No 1 was guilty of theft, as he had removed the correspondence without the consent of its custodian, though such removal was temporary, and as his intention in doing so was dishonest, and that accused Nos. 2 and 3 were guilty of abetment of theft[3].

Unauthorised consent.—Possession of wood by a Forest Inspector who is a servant of Government, is possession of the Government itself, and a dishonest removal of it, without payment of the necessary fees, from his possession, albeit with his actual consent, was held to constitute theft, as the consent obtained was unauthorised and fraudulent[4].

5. 'Moves that property in order to such taking'.—The least removal of the thing taken from the place where it was before is a sufficient asportation though it be not quite carried off[5]. It is not necessary that the property should have been removed out of its owner's reach or carried away from the place in which it was found. Upon this ground the guest, who having taken off the sheets from his bed with an intent to steal them carried them into the hall, and was apprehended [illegible] s he, [illegible] efore [illegible] g to [illegible] was

1 *Eggington*, (1801) 2 East P. C. 666.
2 *Chandler*, [1913] 1 K. B 125.
3 *Vallabhram*, (1925) 27 Bom. L. R. 1391, 8 Bom. Cr. C 157
4 *Hanmanta*, (1877) 1 Bom. 610.
5 2 East P. C. 555
6 *Ibid*, 555-556; *Simson*, (1864) Kel. 31.

Explanations 3 and 4 state how 'moving' could be effected in certain cases. Illustrations (*b*) and (*c*) elucidate the meaning of explanation 4.

The offence of theft is completed when there is a dishonest moving of the property, even though the property is not detached from that to which it is secured[1].

Cases.—The accused, being in the employ of Government in the Post Office Department, while assisting in the sorting of letters, secreted two letters with the intention of handing them to the delivery peon and sharing with him certain moneys payable upon them. It was held that he was guilty of theft and of attempt to commit criminal misappropriation of property[2]. The accused brought a civil suit on the basis of a forged promissory note. The file of the case was sent for by another Court as it was required in connection with a suit pending in that Court. It somehow found its way to the house of an official of that Court. The accused got into the inner verandah of the house and removed the forged promissory note from the file. On being pursued, they tore it to pieces. It was held that they were guilty of an offence of theft and also of an offence under ss. 201 and 511[3].

Where the accused cut the string which fastened a *hass* (neck ornament) round the complainant's neck, and forced the ends of the *hass* slightly apart in order to remove the same from the neck with the result that in the struggle that ensued between her and the accused the *hass* fell from her neck and was found on the bed later on, it was held that there had been a sufficient "moving" of the *hass* to constitute the offence of theft[4].

On suspicion of theft of certain articles from a running goods-train, a van on the train, in which four coolies were travelling, was searched. The property missed was not found, but, hidden under a heap of clothing belonging to the four coolies, were discovered pieces of cloth, which on investigation were ascertained to have been abstracted from the next van. It was held that none of the four coolies travelling in the van where the pieces of stolen cloth were found could be convicted of theft of the cloth in the absence of evidence to connect one or more of them individually with the possession of the cloth[4].

English cases.—Where the accused lifted up a bag from the bottom of a boot of a coach but was detected before he had got it out, and it did not appear that it was entirely removed from the space it at first occupied in the boot, but the raising it from the bottom had completely removed each part of it from the space that specific part occupied, it was held that this was a complete asportation[6]. Where the servant of a tallow-chandler removed fat belonging to his master from the room in which it was kept, to a room where his master was accustomed to buy fat from persons who had it to sell, and placed it on a pair of scales there, with intent to sell it to his master, and appropriate the proceeds to his own use, this was held to be larceny[7]. Pulling wool from the bodies of live sheep and lambs was held to be larceny[8]. The accused was a letter carrier and it was his duty to deliver letters given to him, and, if from any cause he was unable to deliver them, to bring them back to the Post Office in his pouch. He did not deliver a letter containing money which had been sorted to him for delivery, nor did he return it to the Post Office on the completion of his round; but, on being asked for it soon afterwards, he produced it from his pocket, and gave a false excuse for not having delivered it. It was held that there was sufficient taking to constitute larceny[9]. In an indictment for stealing five pints of porter, it appeared that the accused was discovered

1 *Nga Po Hle*, (1886) S. J. L. B. 399.

2 *Venkatasami*, (1890) 14 Mad. 229. See to the same effect, *Eggington*, (1801) 2 East P. C. 666; *Thomas Poynton*, (1862) L. & C. 247.

3 *Sheonandan*, (1915) 16 Cr. L. J. 791.

4 *Bisakhi*, (1917) P. R. No. 29 of 1917.

5 *Ali Husain*, (1901) 23 All. 306.

6 *James Walsh*, (1824) 1 Mood. 14; *Henry Coslet*, (1782) 1 Leach 236.

7 *Hall*, (1849) 3 Cox 245.

8 *Robert Martin*, (1777) 1 Leach 171.

9 *Thomas Poynton*, sup.

standing by a barrel of porter, out of a hole in which the porter was running into a can on the ground, and that above five pints had run into the can. It was held that there was sufficient asportation proved of the porter in the can[1].

Explanations 1 and 2.—The moving by the same act which effects the severance may constitute theft[2]. Carrying away of trees after felling them is theft[3], but mere sale is not[4]. In the case of growing grass, a moving by the same act which effects its severance from the earth amounts to theft[5]. Where certain land, on which there was a standing crop of paddy, was entrusted to the accused to take care of and watch till the paddy was ripe when they were to give notice to the factory people who would reap it, it was held that by cutting the crops themselves and disposing of the same, the accused were guilty of theft if not of criminal breach of trust[6].

Husband and wife.—**Hindu law.**—There is no presumption of law that a husband and wife constitute one person in India for the purpose of criminal law. [illegible] his house, does so with dishonest [illegible] who removes from the posses- [illegible] *palla* or *stridhan*, cannot be convicted of theft[8]. So also a husband cannot be convicted of robbing his wife, she being completely under the control of her husband. He can be convicted if he steals his wife's *stridhan* which is her absolute property.

The proposition that everything acquired by a woman during coverture is the property of her husband has no foundation in Hindu law[9].

Mahomedan law.—It is laid down that a Mahomedan wife may be convicted of stealing from her husband; because under this system of law, there does not exist the same union of interest between husband and wife which exists between an English husband and wife[10]. The same reasoning would apply in the case of a Mahomedan husband.

English law.—There is such a unity of interest between husband and wife that ordinarily the wife cannot steal the goods of the husband, nor can an indifferent person steal the goods of the husband by the delivery on the part of the wife; and if the wife deliver the goods of the husband to an indifferent person, for that person to convert them to his own use, this is no larceny; but if the person to whom the goods are delivered by the wife be an adulterer it is otherwise, and an adulterer can be properly convicted of theft even though they be delivered to him by the wife. If no adultery has actually been committed by the parties, but the goods of the husband are removed from his house by the wife and the intended adulterer, with an intent that the wife should elope with him and live in adultery with him, this taking of the goods is, in point of law, a larceny[11]. But as a husband and wife are one person in law, the wife cannot steal her husband's goods whether she had committed adultery or not[12]. But a person who receives money stolen by a wife from her husband will be punishable for misdemeanour under the Married Women's Property Act[13]. In order to punish the adulterer the goods should be traced in any way to his personal possession[14].

1 *Wallis*, (1848) 3 Cox 67.
2 (1870) 5 M. H. C. App. 36.
3 *Bhagu Vishnu*, (1897) Cr. R. No. 36 of 1897, Unrep. Cr. C. 928; *Abdul Ali Fakir* v. *Netali Fakir*, (1911) 27 C. L. J. 228.
4 *Balos* alias *Hussain Sahib*, (1882) 1 Weir 419.
5 [illegible]
6 [illegible]
7 [illegible]
8 [illegible] 11.
9 *Ramasami Padiyatchi* v. *Virasami Padiyatchi*, (1867) 3 M. H. C. 272.
10 [illegible]
11 [illegible]
12 *Kenny*, (1877) 2 Q. B. D. 307.
13 *Payne*, [1906] 1 K. B. 97.
14 *Rosenburg*, (1843) 1 C. & K. 233

Under ss. 12 and 16 of the Married Women's Property Act, 1882, the stealing of her husband's goods by a wife when about to leave or desert him or when living separate from him, is made punishable.

Necessitas inducit privilegium quo ad jura privata.—Where a man in extreme want of food or clothing steals either in order to relieve his present necessities, the law allows no such excuse to be considered. See the doctrine of self-preservation discussed at page 159 and of necessity at page 194.

Abetment.—The carrying off of certain buffaloes to the complainant by order of the accused, and the retention of them in the custody of the latter's servant, was held to be an abetment of theft[1]. Where it was found that theft was actually committed by certain members of an unlawful assembly, but it was not found that the accused himself committed it by removing any property or that he had made any preparation for committing it or aiding anyone in the commission of it, it was held that he could not be convicted under this section read with s. 114, though he could be under this section read with s. 149[2].

PRACTICE.

Evidence.—Prove (1) that the property in question is moveable property.

(2) That such property was in the possession of a person.

(3) That the accused moved such property whilst in the possession of that person.

(4) That he did so without the consent of that person.

(5) That he did so in order to take the same out of the possession of that person.

(6) That he did so with intent to cause wrongful gain to himself or wrongful loss to that person[3].

It is not sufficient that the property found in the accused's possession was like the one stolen; there must be a finding to the effect that that property was the stolen property[4].

Presumption.—Possession of stolen goods soon after the theft raises the presumption that the possessor is either the thief or has received the goods knowing them to be stolen[5]. Whether the possession of stolen property is recent enough to warrant a conviction for the substantive offence is a matter entirely for the jury[6]. But unexplained possession of non-identifiable matter (such as paddy) alleged to be stolen does not amount to proof of theft[7]. In considering whether the possession of stolen goods raises a presumption of dishonest receipt of stolen property, the attention of the jury should be drawn to the necessity of satisfying themselves that the possession is clearly traced to the accused[8]. The question of what is or what is not a recent possession of stolen property is to be considered with reference to the nature of the article stolen. Thus, where two ends of woollen cloth in an unfinished state, consisting of about twenty yards each, are lost, and were in the possession of the accused two months after being stolen, and still in the same state, it was held that this was a possession sufficiently recent to call on the accused to

1 *Tarinee Prosaud Banerjee*, (1872) 18 W. R. (Cr.) 8.

2 *Hansa Pathak v. Bansi Lal Das*, (1901) 8 C. W. N. 519.

3 *Madan*, (1882) 1 Weir 411; *Abdool Biswas v. Khater Mondal*, (1899) 3 C. W. N. 332.

4 *Banu Chela*, (1886) Cr. R. No. 5 of 1886, Unrep. Cr. C. 227.

5 Section 114 of the Indian Evidence Act; *Mottee Jolaha*, (1866) 5 W. R. (Cr.) 66; *Jogeshur Bagdee*, (1867) 7 W. R. (Cr.) 73 [109]; *Shurruffooddeen*, (1870) 13 W. R. (Cr.) 26; *Poromeshur Aheer*, (1875) 23 W. R. (Cr.) 16; *Ramjoy Kurmokar*, (1876) 25 W. R. (Cr.) 10; *Ina Sheikh*, (1885) 11 Cal. 160; *Ishan Chandra*, (1893) 21 Cal. 328, 336; *Kasim*, (1879) P. R. No. 19 of 1879; *Tabu*, (1891) P. R. No. 15 of 1891.

6 *Guzzala Hanuman*, (1902) 26 Mad. 467.

7 (1873) 7 M. H. C. App. 199, followed in *Royapuan*, (1894) 1 Weir 429; *Sini Tevan*, (1886) 1 Weir 429.

8 *Malhari*, (1882) 6 Bom. 731; *Mataro*, (1928) 29 Cr. L. J. 924.

show how he came by the property[1]. Where a stolen buffalo was not traced to the accused until twelve months after the theft, it was held that this was not recent possession which would justify the presumption, in the absence of an explanation [illegible] uffalo, that the accused stole it[2]. [illegible] suspicion is not rebutted when [illegible] ion is wrong, suspicion becomes confirmed and becomes much more than suspicion. Where recent possession of stolen property and mere recent possession is relied upon to prove theft or dishonest [illegible][3]

[illegible] antial, such evidence [illegible] other person or must [illegible]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by any Magistrate—Triable summarily, if property not worth more than Rs. 50.

Venue.—The offence of theft, or any offence which includes theft or the possession of stolen property, may be inquired into or tried by a Court within the local limits of whose jurisdiction such offence was committed or the property stolen was possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen[5].

Joint trial.—A and B are both charged with a theft, and B is charged with two other thefts committed by him in the course of the same transaction. A and B may be both tried together on a charge charging both with one theft, and B alone with the other two thefts[6].

Joinder of charges.—*Theft and concealing stolen property.*—A charge under s. 380 cannot be joined to a charge under s. 414, such joinder, being opposed to s. 233, Criminal Procedure Code, constitutes not merely an irregularity but an illegality[7].

House-breaking and theft—When offences under ss. 457 and 380 are committed in one transaction, it is very desirable that formal convictions under both sections should be recorded, in order that if the accused subsequently commits another theft, technical difficulties may not arise[8].

Theft and receipt of stolen property.—A person committing theft and a person who receives the stolen property may be tried jointly where practicable[9]. Where there are several receivers of stolen property this should not be done[10]

Theft and mischief.—Where a person who has stolen an animal subsequently kills it for the purpose of eating it, he cannot be convicted under both this section and s. 429. Where after a thief has stolen and killed an animal, another person assists him in skinning the carcass, the person so assisting is not guilty either of an offence under this section or of an offence under s. 429[11].

Conviction for a different offence.—A person accused of theft may be convicted of criminal misappropriation, criminal breach of trust, or cheating, and *vice versa*[12].

1 *Partridge*, (1836) 7 C. & P. 531. See *Poromeshur Aheer*, (1875) 23 W. R. (Cr.) 16; *T. Burke*, (1884) 6 All. 224, 227.

2 *Nga Yauk*, (1883) S. J. L. B. 366; *Narain Singh*, (1928) 29 P. L. R. 441.

3 *Nga Tha Dwe*, (1896) P. J. L. B. 279.

4 *Chiraguddin*, (1914) 18 C. W. N. 1144.

5 [illegible] Procedure Code, s. 181 (3)

[illegible]

L. R. 433. See also *Keshav Krishna*, (1904) [illegible]

[illegible]

8 [illegible]

9 *Bhima*, (1916) 14 A. L. J. 344.

10 *Balabhai Hargovind*, sup.

11 *Hussain Buksh Mian*, (1923) 3 Pat. 805; *Jairo*, (1915) 9 S. L. R. 204.

12 Criminal Procedure Code, ss. 236, 237.

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It is irregular to convict and punish a person for abetment of theft, and at the same time to convict and punish him for receiving the stolen property[1].

Repetition.—Every repetition of theft is a grave offence when it indicates a habit not cured by previous light punishments[2]. See s. 75, *supra*.

Single or several thefts.—Removal by one single act of several articles constitutes one offence of theft only, although the articles belong to different persons[3].

The Central Provinces Rules.—As there appears to be a difference of practice in respect of treating thefts as single or several, if in one transaction things belonging to different owners have been stolen, it is necessary to issue some instructions for the guidance of the Police when registering such cases in the Crime Register or when sending them up for trial and for the guidance of Magistrates when deciding whether a single trial or distinct trials are required. At the same time nothing that is here set out can in any way control the discretion given to Magistrates by s. 235 of the Code of Criminal Procedure with regard to the framing of separate charges or the holding of separate trials, whenever it appears appropriate to do so.

If the property, which it was the thief's intention (as shown by the circumstances or by his admission) to take, consisted of a number of contiguous articles, which were reached by one and the same act of trespass or which were the subject of a single enterprise, the moving of each article, in the course of removal of the whole bulk of property, cannot ordinarily be considered to be a distinct theft. The thieving project in such a case was single, although it may have been achieved in detail; and the fact that the spoil taken consisted of several things, whether belonging to the same or the different owners, does not necessarily break up the unity of the transaction.

If, on the other hand, the property taken consisted of a number of articles so distantly or diversely situated as to require a distinct act of trespass or a distinct enterprise for the removal of each, the transaction must ordinarily be held to have been not single but complex, and its achievement to have involved the commission of more than one separate theft.

The following examples will make the distinction clear—

(*a*) A thief enters a house and removes one by one all the articles of value which he finds there. As all the property is got at by one and the same act of trespass, the theft is single although some of the articles may have belonged to friends of the owner of the house.

(*b*) A thief goes to a threshing-floor, where the grain of four cultivators is stored, and steals a little from every heap. Unless it is shown that he had distinct designs against the several owners, it is plain that there was but one act of thieving accomplished through one and the same trespass.

(*c*) A thief snatches from a man's hand a bag containing articles belonging to several persons. The theft thus achieved by a single enterprise is not made multiple by the fact that the things snatched had different owners.

(*d*) A cattle-lifter drives off a herd of six heads, being the bullocks of half a dozen separate cultivators, which were in charge of a boy. This is a single act of theft, the enterprise being single; and is not six thefts, because there were six owners.

(*e*) In a crowded public place, a thief picks the pockets of A, B and C in succession. Three thefts have been committed[4].

Restoration of stolen property.—The property stolen may be returned to the person from whom it was stolen under s. 517, Criminal Procedure Code, and an innocent purchaser may be compensated for the price paid under s. 519, if any

1 *Sita Ram Rai*, (1880) 3 All. 181.
2 *Ram Nhanu*, (1886) Unrep. Cr. C. 296.
3 *Krishna Shahaji*, (1879) Cr. R. No. 33 of 1897, Unrep. Cr. C. 927; *Sheikh Moneeah*, (1869) 11 W. R. (Cr.) 38; *Har Dial*, (1905) P. L. R. No. 144 of 1905.
4 C. P. Cr. C. (1929) No. 16, ss. 6 and 7, pp. 47, 48.

money is found in the possession of the thief. But the property restored should be in existence at the time of theft. R's cow, having been stolen, the thief after a lapse of a year and a half was convicted. Six months after the theft V innocently purchased the cow, which, while in his possession, had a calf. The Magistrate ordered that the cow and the calf should be delivered up by V to R. It was held that as the calf was not even in embryo at the date of the theft the order to deliver up the calf was illegal[1].

A difference, however, should be noted when the thing stolen is (*a*) a negotiable instrument, or (*b*) a bank note.

(*a*) When, an instrument, such as a promissory note, has been stolen, the person from whom it was stolen has a good title to it, not only as against the thief, but also as against any person who subsequently becomes the holder, unless such person can prove that the instrument had become negotiable at the time it was stolen, and that he had obtained it bona fide for value without notice of theft[2].

(*b*) A currency note being in legal view money, the property in it passes by mere delivery, and in the interests of commerce and the security of human dealing nothing short of fraud in taking an instrument payable to bearer will engraft an exception upon the rule[3]. A currency note is a 'legal tender' for the amount expressed therein[4]. Property in it passes by mere delivery[5].

Title to money which is current coin of the realm passes by mere delivery to a person who receives it in satisfaction of a lawful debt even though the money was obtained by committing the offence of cheating[6].

When an accused is acquitted of a charge of theft and the property found with him is not found to be the subject of theft, he is entitled to recover the property; but if the property found with him is the subject of theft, the stolen thing will not be delivered to him, his acquittal being due to the incompleteness of evidence[7].

Charge.—I (*name and office of Magistrate etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed the theft of (*specify the thing*) by taking it out of the possession of AB, and thereby committed an offence punishable under s. 379 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge[8].

Punishment.—Imprisonment only is a legal punishment: fine need not necessarily be inflicted in addition[9]. Nor can fine be substituted in lieu of imprisonment[10]. The law does not contemplate that a thief should be more severely punished because he renders the recovery of the stolen property impossible[11]. A sentence should never be heavier than is necessary to deter the criminal from committing the offence again[12].

Railway thefts.—In cases of thefts from a railway train, where the Magistrate is once satisfied that the accused has committed the offence, the sentence should be of a deterrent nature[13].

1 *Vernede*, (1886) 10 Mad. 25. See *Faiz Ahmad*, (1907) P. R. No. 2 of 1908, where the owner of a buffalo was held entitled to re- [illegible]

[illegible]

[illegible] M. H. C. [illegible]

4 *Michell v. Joggessur Mochi*, (1878) 3 Cal. 379.

5 *Pandharinath Pundlik Revankar*, (1915) 40 Bom. 186, 17 Bom. L. R. 922, 3 Bom. Cr. C. 134.

6 *Baij Nath*, (1914) P. L. R. No. 165 of 1915, P. W. R. (Cr.) No. 58 of 1914.

7 *Rasul Khan*, (1926) 44 C. L. J. 205.

8 *Vide* (1870) 5 M. H. C. App. 37.

9 *Sati*, (1897) Cr. R. No. 7 of 1897, Unrep. Cr. C. 893.

10 *Sheikh Dulloo v. Zainab Bebee*, (1871) 16 W. R. (Cr.) 17.

11 *Nga Aung So*, (1899) P. J. L. B. 633.

12 *Po Nein*, (1917) 9 L. B. R. 167.

13 *Ananda Laxman Babaji*, (1912) 14 Bom. L. R. 504, 1 Bom. Cr. C. 149.

As to the Frontier ... see Frontier Crimes Regulation ... ss. 11 (3) (*d*) and 12 (2).

Whipping.—An attempt to commit theft is not punishable with whipping and a conviction first of an attempt to commit theft, and then of ... theft, will not justify a double sentence of ... and whipping ...

Sections 379 and 215.—"Though the ... object ... committing theft may be to obtain money ... in the manner contemplated ... 215, ... still he is not less liable to be convicted ... theft as well as for the offence ... s. 215.... ; but as the fact that the ... restored the property ... taken into consideration in punishing him ... under s. 379, ... it is only ... exceptional cases that the punishment ... the theft under s. 379 and the taking an illegal gratification under s. 215, ... should ... exceed the punishment which could be inflicted for the ... offence ... s. 71 ... taken as inapplicable"[2].

Where a person offers to take any gratification ... to recover property stolen from him ... receipt of the gratification ... out where the stolen property is concealed, he may ... be convicted ... in the absence of any evidence to show that ... concerned ... If he fails to point out or restore the stolen property, he may properly be convicted of an offence under s. 215[3].

380. Whoever commits theft in any building[1], tent or vessel[2], which building, tent or vessel is used as a human dwelling, or used for the custody of property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Theft in dwelling-house, etc.

COMMENT.

Object.—The object of the section is to give greater security only to property deposited in a house so as to be under the protection of the house and not to property about the person of the party from whom it is stolen. Theft from a person in a dwelling house is, therefore, simple theft under s. 379[4].

Scope.—There is nothing in the section which prevents a person from being convicted under this section for a theft committed by him in his own house. It might at first seem that it was the intention of the legislature to protect property by this section, not from the owner of the house but from others. The section is nearly identical with s. 60 of 24 & 25 Vic., c. 96, and it has been repeatedly held in England that the essential point in the offence of theft in a building is that the property should be under the protection of the building, and that the offence may be committed by the owner of the building or other person who has lawful access to the building[5].

1. **'In any building'.**—The term 'building' means a permanent edifice of some kind. Theft should, under this section, have been committed in any such building[6]. The expression "building" more ... having regard to the expressions "tent" and "vessel" that follow, must be ... as indicating some structure intended for affording some sort of protection to the persons dwelling inside it or for the property placed there for custody. Any structure which does

1 *Abdul Majid*, (1885) S. J. L. B. 338.
2 Per Aston, J. C., in *Nga Tun Bya*, (1893) P. J. L. B. 227, 229.
3 *Nga Ok Gyi*, (1889) S. J. L. B. 449.
4 ... (1876) P. R. No. 14 of 1876.
5 ... (1887) S. J. L. B. 367.
6 ... (1871) Cr. R. Sep. 1871, ...

not afford any such protection by itself but merely serves as a fencing or other means of merely preventing ingress or egress cannot make the place a building[1].

Theft from a verandah[2], or the roof of a house[3], or a brakevan[4], or a railway carriage[5], is not theft in a building. But, where the accused stole some luggage and cash from a railway carriage, when it was at a railway station, it was held that though the railway carriage was not a building, the railway station was, and that the accused had committed an offence under this section[6]. An entrance half surrounded by a wall in which there are two door-ways, but without doors, which is used for custody of property, is a building[7]. A court yard[8] is, but a compound[9] or a cattle pond which was an open plot of land with a boundary fence[10], is not, a building.

Where the accused entered the dwelling house of the complainant and in his presence dishonestly took away certain property, in spite of his remonstrances, it was held that he had committed an offence under this section[11].

Theft by constables of property from the house they were employed to guard was held to be punishable under this section and not under s. 409[12].

Where a carter removed from the godown of a railway company a bag filled with pilferings from a number of bags consigned to others, it was held that the bag being in the possession of the railway as bailees, the taking it out of the godown amounted to theft[13].

Where a person while inspecting the record of a case removed from it a document with the intention of substituting another fabricated by him in its place and [illegible] him, it was held [illegible] owner of a buffalo, [illegible]nce, rescued after [illegible] it was held that he [illegible]ld not be convicted either under this section or s. 454[15].

[illegible]

was asleep. It was held that the offence was that of stealing in a dwelling house[17].

2. 'Vessel'.—See s. 48, *supra*

PRACTICE.

Evidence.—Prove points (1) to (6) as those for s. 379, and further:—

(7) That such property was at the time of the theft in a building, tent, of vessel. All that is necessary is that the property should be under the protection of the building; it is not necessary to show unlawful entrance into the building[18].

1 *Lakshmana Goundan*, (1926) 38 M. L. T. 163, 28 Cr. L. J. 248

2 (1870) 1 Weir 435; contra, *Jobar*, (1880) [illegible]

[illegible] Weir 436.

6 *Sheikh Saheb*, (1886) Cr. R. No. 36 of 1886, Unrep. Cr. C. 293

7 *Dad*, (1878) P. R. No. 10 of 1879.

8 *Shera*, (1879) P. R. No. 33 of 1879; *Ghulam Jelani*, (1889) P. R. No. 16 of 1889; *Surja*, (1882) 2 A. W. N. 224.

9 *Rama*, (1889) Unrep. Cr. C. 484; *Munshi*, (1928) 29 Cr. L. J. 766.

10 *Lakshmana Goundan*, sup.

11 *Kashinath Bhaushet*, (1871) Unrep. Cr. C. 56

12 *Bodnath Singh*, (1865) 3 W. R. (Cr.) 29.

13 *Soukhi Chand Sao*, (1917) 3 P. L. J. 354.

14 *Radha Kishan*, (1925) 7 L. L. J. 118, 26 P. L. R. 95.

15 [illegible]

16 [illegible]

17 [illegible]

18 [illegible]

(8) That such building, tent, or vessel, was then being used as a human dwelling, or for the custody of property.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by any Magistrate—Triable summarily if property not worth more than Rs. 50.

Whipping.—So far as the punishment of whipping is concerned, the offence under this section is held to be a distinct offence from that of theft under s. 378, and is not included under it[1].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed in a building (*or* tent, *or* vessel) used as a human dwelling (*or* for the custody of property), the theft of (*specify the thing*), belonging to AB, and thereby committed an offence punishable under s. 380 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge[2].

Theft by clerk or servant of property in possession of master.

381. Whoever being a clerk or servant[1], or being employed in the capacity of a clerk or servant, commits theft in respect of any property in the possession of his master or employer, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

This section provides for a severe punishment when a clerk or a servant has committed theft because he has greater opportunities of committing this offence owing to the confidence reposed in him. When the possession is with the master this section applies; when it is with the servant, s. 408 comes into operation.

1. **'Clerk or servant'.**—A clerk or servant is a person bound either by an express contract of service, or by conduct implying such a contract to obey the orders and submit to the control of his master in the transaction of the business which it is his duty as such clerk or servant to transact[3]. "What is a test as to the relationship of master and servant? A test used in many cases is, to ascertain whether the prisoner was bound to obey the *orders* of his employer so as to be under his employer's *control*...It is not necessary that there should be a payment by salary—for commission will do—nor that the whole time should be employed, nor that the employment should be permanent,—for it may be only occasional, or in a single instance—if, at the time, the prisoner is engaged as a servant"[4]. "The test is very much this, *viz.*, whether the person charged is under the control and bound to obey the orders of his master. He may be so without being bound to devote his whole time to this service; but if bound to devote his whole time to it, that would be very strong evidence of his being under control"[5]. The allowance of a portion of the profits or goods does not destroy the relation of master and servant[6]. It is necessary that the objects of the service of a 'clerk or servant' should not be criminal but a man may be such a clerk or servant although the objects of his service are in part illegal as being contrary to public policy[7].

1 *Changia*, (1870) 7 B. H. C. (Cr. C.) 68; contra, *Jeewun* v. *Boodha*, (1867) P. R. No. 51 of 1867.

2 (1866) 5 W. R. (Cr. L.) 80.

3 Stephen's Dig. of Crim. Law, Art. 335; *Sohan Lal*, (1905) P. R. No. 50 of 1905.

4 Per Bovill, C. J., in *Negus*, (1873) L. R. 2 C. C. R. 34, 36; *Winnall*, (1851) 5 Cox 326; *Pyo Gyi*, (1919) 12 B. L. T. 58.

5 Per Blackburn, J., in *Negus*, *ibid*, p. 37.

6 *Lall Chand Roy*, (1868) 9 W. R. (Cr.) 37.

7 *Stainer*, (1870) L. R. 1 C. C. R. 230.

CASES.

Clerk.—Where the clerk of a toll-contractor illegally levied toll on carts laden when leaving a town, and prevented the carts from passing through the toll gate unless the toll demanded was paid, he was guilty of this offence[1].

Servant.—Where some policemen stole a sum of money shut up in a box, and placed it in the Police Treasury building, over which they were mounting guard as sentinels, they had committed an offence under this section and not one under s. 409[2]. Where a person engaged to cart tamarind fruits from a forest abstracted a portion of it, it was held that he was not the less a servant because his employment was temporary[3]. But a hired boatman is not a servant[4].

An unpaid apprentice is held to be a 'servant' within the meaning of this section[5].

English cases.—The following come within the expression 'clerk or servant'. —An apprentice under the age of eighteen[6], a person paid for his services by a commission or share in the profits[7], a person who is occasionally employed[8]; a person who is not a general servant but employed for a particular purpose[9]; a person employed by different persons at the same time for different purposes[10]; a person who acted as a clerk or servant though not expressly appointed as such[11] and a director of a company[12]

The accused, a servant of B, a horse-dealer, was sent by him to the prosecutor to deliver a horse The prosecutor asked the accused to sell a pony for him to C for £ 5 and not less. The accused took the pony to another person, sold it for £ 3 and absconded with the money It was held that the pony was in the custody of the accused in the character of a servant to the prosecutor, and that it was not in his possesion as bailee, and that he was therefore guilty of larceny[13].

The following persons do not fall under the expression 'clerk or servant'. —The driver of a coach hired for the day of the party hiring[14], the person employed to collect the sacrament money from the communicants of the minister to church wardens[15], a person requested to receive money in a single instance only[16]; a person employed to solicit orders for a particular person only but at liberty to apply for orders whenever he thought most convenient and to be paid by commission[17]; a person employed to get the orders for goods, and to receive payment for them, but who was at liberty to get the orders and receive the money where and when he thought proper and was to be paid by a commission on the goods sold[18]; the treasurer of a friendly society who received no payment for filling the office[19], an accountant and a debt-collector engaged by the complainant to collect debts on terms of receiving five per cent. on the amount collected[20]; and a member of a committee appointed to conduct an excursion and who received no remuneration for his services[21].

(1811) R. & R. 198.

11 *Foulkes*, (1875) L. R. 2 C. C. R. 150.

12 *Stuart*, [1894] 1 Q. B. 103

13 *Stanbury*, (1847) 2 Cox 272.

14 *Haydon*, (1836) 7 C. & P. 445.

15 *John Burton*, (1829) 1 Mood. 237.

16 *William Nettleton*, (1830) 1 Mood 259.

17 *Negus*, (1873) L. R 2 C. C. R. 34.

18 *Bowers*, (1866) L R 1 C. C. R. 41. See *Bailey*, (1871) 12 Cox 56, where the accused was to get remuneration by commission but

PRACTICE.

Evidence.—Prove points 1 to 6 as those for s. 379, and further—

(7) That the accused was at the time a clerk, or servant and was employed in such capacity by the person in whose possession the stolen property was.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class—Triable summarily if the property is not worth more than Rs. 50.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, being a servant [*or* clerk *or* employed in the capacity of a clerk *or* servant] of AB, committed theft by stealing property, to wit—, in the possession of the said AB, and thereby committed an offence punishable under s. 381 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (or High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge[1].

Theft after preparation made for causing death, hurt or restraint, in order to the committing of the theft.

382. Whoever commits theft, having made preparation for causing death, or hurt, or restraint, or fear of death, or of hurt, or of restraint, to any person, in order to the committing of such theft, or in order to the effecting of his escape after the committing of such theft, or in order to the retaining of property taken by such theft, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

ILLUSTRATIONS.

(*a*) A commits theft on property in Z's possession; and, while committing this theft, he has a loaded pistol under his garment, having provided this pistol for the purpose of hurting Z in case Z should resist. A has committed the offence defined in this section.

(*b*) A picks Z's pocket, having posted several of his companions near him, in order that they may restrain Z, if Z should perceive what is passing and should resist, or should attempt to apprehend A. A has committed the offence defined in this section.

COMMENT.

The possession by a thief at the time of his committing a theft of a knife or other weapon, which, if used on a human being, might cause death or hurt, would not of itself justify a conviction under the section. There must be something to show or from which it may properly be inferred, that the offender made preparation for causing one or more of the results mentioned in the section[2].

If hurt is actually caused when a theft is committed, the offence is punishable as robbery, and not under this section[3]. In robbery there is always injury. In offences under this section the thief is full of preparation to cause hurt, but he may not cause it. A stole some rice from a house. While carrying it away he was seized by B. He thereupon dropped the rice and then stabbed B with a knife. He was convicted of causing hurt while committing robbery under s. 394. It was

1 (1865) 2 W. R. (Cr. L.) 15.

2 Per Fox, J., in *Nga Shan Gale*, (1903) 10 Burma L. R. 87, 89.

3 *Hushrut Sheik*, (1866) 6 W. R. (Cr.) 87.

held that as A dropped the rice before stabbing B, he could not have caused the hurt for the purpose of carrying away the rice, and the offence was therefore not robbery, but one under this section and s. 324[1].

PRACTICE.

Evidence.—Prove points (1) to (6) as those for s. 379; and further—

(7) That the accused, when committing such theft, made preparation for causing death, hurt, or restraint or fear of death, hurt, or restraint.

(8) That he did as above in order (*a*) to the committing of such theft, or (*b*) to effect his escape after having committed such theft, or (*c*) to retain property taken by such theft.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable.—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or al

the article) the property

[*or* hurt *or* restraint] by

mitting of the said theft

s. 382 of the Indian Penal Code and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—As to crimes on the Frontier, see the Frontier Crimes Regulation (III of 1901). As to enhanced punishment in the case of a criminal tribe, gang, or class, see the Criminal Tribes Act, 1897, s. 6. As to Burma, see the Burma Laws Act, 1898, s. 4 (3) (*b*) and Sch. II.

Of Extortion.

383. Whoever intentionally puts any person in fear of any injury to that person, or to any other[1], and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security[2], commits "extortion."

Extortion.

ILLUSTRATIONS.

(*a*) A threatens to publish a defamatory libel concerning Z, unless Z gives him money. He thus induces Z to give him money. A has committed extortion.

(*b*) A threatens Z that he will keep Z's child in wrongful confinement, unless Z will sign and deliver to A a promissory note binding Z to pay certain moneys to A. Z signs and delivers the note. A has committed extortion.

(*c*) A threatens to send club-men to plough up Z's field unless Z will sign and deliver to B a bond binding Z under a penalty to deliver certain produce to B ... on.

... ign

... per

... A

has committed extortion.

[1] *Nga Paing*, (1907) 4 L. B. R. 147.

384. Whoever commits extortion shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Punishment for extortion.

COMMENT.

This offence occupies a middle place between theft and robbery.

Theft and extortion.—Extortion is distinguishd from theft by the obvious circumstances that the consent is obtained by putting the person in possession of property in fear of injury to him or to any other. The offence is carried out by overpowering the will of the owner[1]. In theft the offender's intention is always to take without that person's consent. Besides, the property which is obtained by extortion is not limited, as in theft, to moveable property only. As the word 'moveable' is omitted in the definition, immoveable property may be the subject of extortion.

Ingredients.—The ingredients of extortion are—

1. Intentionally putting a person in fear of injury to himself or another.
2. Dishonestly inducing the person put in fear, to deliver to any person any property or valuable security.

1. 'Puts any person in fear of any injury to that person, or to any other'.—The injury may be intended to the persons put in fear, or to any other No tie of relationship is necessary between that person and the person put in fear. The word 'injury' is defined in s. 44, *supra*. The injury contemplated must be one which the accused himself can inflict or cause to be inflicted, and a threat of divine punishment is not such[2].

The Law Commissioners observe: "We conceive that it will be a question for the Court whether the injury threatened was such as was likely to produce the effect intended, and whether under the circumstances the party was really put in fear, believing the injury to be inevitable if he did not comply"[3].

The age, sex and situation of the person threatened may properly be taken into consideration. To constitute the offence it seems necessary that the person threatened should be actually put in fear; upon the whole of the facts, however, if there is reason enough to say that similar circumstances would ordinarily excite fear in persons of the same age, etc., as the person threatened, the Court will not too easily listen to suggestions or evidence adduced to show that the passion of fear was not in truth aroused. Nor, on the other hand, considering that the proof that he was put in fear will often mainly be the evidence of the person threatened, and that exaggerated, if not false, versions of the occurrence are not improbable, should the charge of extortion be considered as established without a cautious investigation[4].

The 'fear' must be of such a nature and extent as to unsettle the mind of the person on whom it operates, and take away from his acts that element of free, voluntary action which alone constitutes consent. Where the threats are not necessarily of a character to excite such alarm, it becomes a question for the jury whether they were made under such circumstances of intimidation as to have that effect[5]. Thus, threatening to expose a clergyman, who had criminal intercourse with a woman in a house of ill-fame, in his own church and village, to his own bishop, and to the archbishop; and also to publish his shame in the newspaper was held to be such a threat as a man of ordinary firmness could not be expected to resist[6].

[1] *Meajan*, (1865) 4 W. R. (Cr.) 5.
[2] *Doraswamy Ayyar*, (1924) 48 Mad. 774.
[3] First Report, s. 517, p. 306.
[4] M. & M. 344.
[5] *George Walton*, (1863) 9 Cox 268.
[6] *Nathalie Miard*, (1844) 1 Cox 22.

In *R.* v. *Tomlinson*[1], Wills, J., said: "With regard to the doctrine that the threat must be of a nature to operate on a man of reasonably sound or ordinarily firm mind, I only desire to say that it ought, in my judgment, to receive a liberal construction in practice; otherwise great injustice may be done, for persons who are thus practised upon are not as a rule of average firmness, but I quite appreciate the fact that the threat must not be one that ought to influence nobody". The rule that a threat is not of a criminal character unless it be such as may overcome the ordinary free will of a firm man, has reference to the general nature of the evil threatened, and not to the probable effect of the threat on the mind of the particular party addressed[2].

Threat of criminal accusation.—The terror of a criminal charge, whether true or false, amounts to a fear of injury[3]. The guilt or innocence of the party threatened is immaterial. Therefore, although the prosecutor may be cross-examined with a view to show that he is really guilty of the offence imputed to him, yet no evidence will be allowed to be given, even in cross-examination, by another witness, to prove that the prosecutor is really guilty[4] But it is material in considering the question whether, under the circumstances of the case, the intention of the accused was to extort money, or merely to compound a felony[5].

Extortion may be committed even though the threat may be to accuse a person of misconduct not amounting to an offence against the criminal law[6]. Even the threat need not be a threat to accuse before a judicial tribunal. a threat to charge before any third person is enough[7].

Though to threaten to use the process of the law is perfectly lawful, to do so for the purpose of enforcing payment of more than is due is illegal, and such a threat made with such an object is a threat of injury sufficient to constitute extortion. Where, therefore, the accused, whose goat had been injured by the complainant, demanded of her a sum in excess of his value, and by threatening [illegible] f that amount, it was held that [illegible] extortion and the fact that the [illegible] be charged was compoundable could make no difference in respect of his criminal liability[8].

2. 'Dishonestly induces the person so put in fear to deliver to any person any property or valuable security, etc'—The element of dishonesty is the essence of this offence[9].

Delivery by the person put in fear is essential Where a person through fear offers no resistance to the carrying off of his property, but does not deliver any of the property to those who carry it off, the offence committed is robbery and not extortion[10].

An intent to extort money may be implied from circumstances, and does not require an express demand of money. But if it appear that the object is to compel the delivery of accounts of moneys honestly believed to be due and owing, there is no evidence of the intent[11]. Where the accused forcibly removed certain property from the possession of the complainant claiming that the same belonged to himself and placed it in trust with a shop-keeper, and it appeared that there was some evidence to show [illegible] held that it was clear [illegible] property, and no offen[illegible]

[1] [1895] 1 Q. B. 706, 710.

[2] [illegible]

[8] [illegible] r 441; [illegible]

[9] [illegible] r 440.

[10] [illegible] (Cr.) 19.

[11] *Coghlan*, (1865) 4 F. & F. 316.

[12] *Ujagar Singh*, (1925) 26 Cr. L. J. 794, 7 L. L. J. 121.

'To any person'.—It is not necessary that the threat should be used, and the property received, by one and the same individual. It may be a matter of arrangement between several persons that the threat should be used by some, and the property received by others; and they all will be guilty of extortion[1].

'Valuable security' is defined in s. 30, *supra*.

'Anything signed or sealed which may be converted into a valuable security'.—These words denote that incomplete deeds may be the subject of extortion under this expression. For instance, A signs his name to a blank paper or to a promissory note in which date, sums, etc., are not filled up; or A having caused a deed or a bond to be prepared, has signed and sealed it, but has not yet delivered it as his deed, this act of delivery being that which gives full legal effect and operation to the instrument. In each of these cases the blank paper and the incomplete deed are subjects of extortion[2].

Statutory application.—See the Indian Army Act (VIII of 1911), s. 35 (*a*).

CASES.

Threat of loss of appointment.—The making use of real or supposed influence to obtain money from a person against his will under threat, in case of refusal, of loss of an appointment, amounts to extortion[3].

Money extorted by a threat of wrongful confinement.—The accused arrested one J., wrongfully confined him, and extorted from him Rs. 200 under a threat that he would not be relieved unless the money were paid. This money was paid by P, a money-lender, who lent it to J. It was held that the accused was guilty under s. 384, but P could not be regarded as an accomplice[4].

Where a policeman, late at night, met the prosecutor, who had just parted from a female in a street, to whom he had been talking, and told him that he had been talking to a prostitute, and that he must go with him to the Bridewell and that the prosecutor was under a penalty of £1 for talking to a prostitute in the street, and that if the prosecutor would give him 5*s*. he might go about his business; it was held that this amounted to extortion[5].

A acted as auctioneer at a mock auction. H knocked down some cloth for 26*s*. to B, who had not bid for it, as A knew. B refused to take the cloth or to pay for it; A refused to allow her to leave the room unless she paid. Ultimately, she paid the 26*s*. to A, and took the cloth. She paid 26*s*. because she was afraid. It was held that A was guilty of larceny[6]. In India the offence will be that of extortion.

Threat of incendiarism.—A letter written to a banker, stating that it was intended by a cracksman to burn his books and cause his bank to stop, and that, if £250 were put in a certain place, the writer of the letter would prevent the mischief, but if the money was not put there, it would happen, was held to be a letter demanding money by threat[7].

Threat of a criminal charge.—Where the accused threatened A's father that he would accuse A of having committed an abominable offence upon a mare, for the purpose of putting off the mare, and forcing the father, under terror of the threatened charge, to buy and pay for her at the accused's price, it was held that the accused was guilty of extortion[8].

1 *Shankar Bhagvat*, (1866) 2 B. H. C. 394.
2 M. & M. 346.
3 *Ameer Abbas Ali* v. *Omed Ali*, (1872) 18 W. R. (Cr.) 17.
4 *Akhoy Kumar* v. *Jagat Chunder*, (1900) 27 Cal. 925.
5 *James Robertson*, (1864) 10 Cox 9.
6 *Peter McGrath*, (1869) L. R. 1 C. C. R. 205.
7 *Thomas Smith*, (1849) 2 C. & K. 882.
8 *Henry Redman*, (1865) L. R. 1 C. C. R. 12.

Money extorted by frightening a person.—The prosecutrix gave L, a travelling grinder, six knives to grind for her, the ordinary charge for grinding which would be 1*s*. 3*d*. L ground the knives, and then demanded with threats 5*s*. 6*d*. as his charge from the prosecutrix. The prosecutrix, being thus frightened, in consequence of her fears, paid L the sum demanded. It was held that this was obtaining money by threat[1]. Where some vaccinators threatened to cause pain to children while taking lymph from their arms unless they received some money, it was held that they were guilty of this offence[2].

Illegal exaction of money—A cloth-seller was threatened with the imposition of a fine if he continued to sell foreign cloth. He continued to sell such cloth, and, to enforce payment of the fine, his shop was picketed for two hours and he lost a certain amount of business and ultimately paid the fine, it was held that the person responsible for the picketing, who had been convicted under s 385, was rightly convicted, and might very well have been convicted under this section[3]. Where a person, without any right took away cattle belonging to another and declined to release them until he was paid a certain sum and it was on receipt of that sum that he released them, it was held that he was guilty of extortion[4].

No extortion.—The mere issue of an order to collect statistical information by a police-officer[5]; a refusal to allow people to carry away firewood collected in a Government forest without payment of proper fees[6]; a payment taken from the owners of trespassing cattle under the influence of a threat that the cattle would be impounded if the payment were refused[7]; and obtaining a bond under the threat of not rendering service as Vakil[8], did not constitute extortion.

A *nikah khawan* is not bound to read a *nikah* for a person unless he chooses to do so, and it is no offence for him to demand any fee he likes for doing so[9].

Mere presence is not abetment.—The mere fact that the offence of extortion is committed in the presence of a village watchman, without eliciting approval on his part, does not render him liable as an abettor of the offence[10]

PRACTICE.

Evidence.—Prove (1) that the accused put the complainant in fear of some injury.

(2) That such injury was either to the complainant or to some other person.

(3) That the accusd did so intentionally

(4) That he thereby induced the person so put in fear to deliver to some person some property or valuable security, or something signed or sealed, which was convertible into a valuable security.

(5) That the accused acted dishonestly in doing as above.

Procedure.—Not cognizable—Warrant—Bailable—Not compoudable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Where it is doubtful whether property is obtained by fraudulent inducement or by putting in fear of injury, the accused can be punished either for extortion or for cheating[11].

Place of trial.—See ill. (*c*) to s. 179, Criminal Procedure Code.

1 *Lovell*, (1881) 8 Q. B D. 185

2 *Hari Har*, (1886) 1 C. P. L. R. 24.

3 *Chaturbhuj*, (1922) 45 All. 137; *Mamant Rao*, (1923) 25 Cr. L J. 60.

4 *Habib-ul-razzaq*, (1923) 46 All. 81.

5 *Meajan*, (1865) 4 W. R. (Cr) 5.

6 *Abdul Kadar*, (1866) 3 B. H. C. (Cr. C.) 45.

7 (1880) 1 Weir 438; *[illegible]*, (1883) 1 Weir 440

8 (1870) 5 M. H. C. App. 14.

9 *Nizam Din*, (1923) 4 Lah. 17[illegible].

10 *Gopal Chunder [illegible]*, (1882) 8 Cal. 728.

11 *Ramnarain [illegible]*, [illegible] W. R. (Cr.) 32.

Charge.—I (name and office of Magistrate [illegible]) hereby charge you (name of accused) as follows:—

That you, on or about the —— day of ——, at ——, committed extortion by putting AB in fear of a certain injury, to wit——, and thereby dishonestly induced the said AB to deliver to you a certain property, to wit—— ; and that you thereby committed an offence punishable under s. 384 of the Indian Penal Code and within my cognizance [or the cognizance of the Court of Session or High Court].

And I hereby direct that you be tried [by the said Court (in cases tried by Magistrate omit these words)] on the said charge.

Punishment.—For enhanced punishment in the case of members of a tribe, gang, or class, see the Criminal Tribes Act (II of [illegible]), s. [illegible].

385. Whoever, in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury[1], shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Putting person in fear of injury in order to commit extortion.

COMMENT.

By this section a distinction between the inchoate and the consummated offence is recognized. The attempt to commit extortion has proceeded so far towards completion that a person has been put in fear of injury, or that there has been an attempt to excite such fear; but the offence is incomplete because there has been no delivery of property, etc. The Court must be satisfied that the putting in fear was with the intention of extorting a delivery of property[1].

1. **'Injury'.**—See s. 44, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused put the complainant in fear, or attempted to put him in fear.

(2) That the fear was regarding some injury.

(3) That the accused did as above to commit extortion.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

386. Whoever commits extortion by putting any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Extortion by putting a person in fear of death or grievous hurt.

COMMENT.

If the fear caused is that of death or of grievous hurt it naturally causes great alarm. The section, therefore, provides for severe penalty in such cases.

PRACTICE.

Evidence.—Prove the same points as those required for s. 384, but prove in point (1) that the fear was of death or of grievous hurt.

1 M. & M. 347.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

387. Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of death or of grievous hurt[1] to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Putting person in fear of death or of grievous hurt, in order to commit extortion.

COMMENT

The relation between this section and s 386 is the same as that between s 385 and s. 384.

1. 'In fear of death or of grievous hurt'.—It is not necessary that the fear of death or of grievous hurt should be instantaneous[1]

See s 46 as to the meaning of 'death' and s 320 as to 'grievous hurt'

The feigning of an attempt to commit suicide in order to extort money is an offence under this section[2].

PRACTICE

Evidence.—Prove that the accused put or attempted to put the complainant in fear of death or of grievous hurt to him or to some other person in order to commit extortion[3].

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Separate convictions.—Separate convictions cannot be passed under both s. 365 and this section[4].

Charge.—See s 385. For the expression "in fear of injury" substitute "in fear of death or grievous hurt".

Punishment.—As to crimes on the Frontier, see the Frontier Crimes Re- As to Burma, see the Burma Laws Act

388. Whoever commits extortion by putting any person in fear of an accusation[1] against that person or any other, of having committed or attempted to commit any offence[2] punishable with death, or with transportation for life, or with imprisonment for a term which may extend to ten years, or of having attempted to induce any other person to commit such offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if the offence be one punishable under section 377 of this Code, may be punished with transportation for life.

Extortion by threat of accusation of an offence punishable with death or transportation, etc.

[1] *Tun Baw*, (1912) 6 L. B. R. 100, F.B.
[2] *Gregory*, (1866) 1 Ind. Jur. N S. 423.
[3] *Vide* s. 384, sup.
[4] *Po Lan*, (1912) 6 L. B. R. 160.

COMMENT.

The aggravating circumstance under this section is the threat of an accusation of an offence punishable with death, transportation for life or with imprisonment for ten years. If the accusation is of unnatural offence (s. 377) then the penalty provided is severer.

1. **'Fear of an accusation'.**—It is immaterial whether the person against whom the accusation is threatened be innocent or guilty if the accused intended to extort money[1].

2. **'Offence'.**—The word 'offence' means a thing punishable under the Code or any special or local law (s. 40).

PRACTICE.

Evidence.—Prove the same points as those required for s. 384, showing that the fear was occasioned by a threat of an accusation of having committed, or having attempted to commit, or induced some one else to commit, an offence punishable with death, or with transportation for life, or ten years' imprisonment, or unnatural offence (s. 377).

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed extortion by putting AB in fear of an accusation against him or against——of having committed [*or* attempted to commit] an offence punishable with death [*or* with transportation for life, *or* with imprisonment, etc.], to wit, the offence of (*specify the name of the offence*), and thereby dishonestly induced the said AB to deliver to you (*mention the thing or property*); and that you thereby committed an offence punishable under s. 388 of the Indian Penal Code and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge[2].

Putting person in fear of accusation of offence in order to commit extortion.

389. Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of an accusation, against that person or any other, of having committed or attempted to commit an offence[1] punishable with death or with transportation for life, or with imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if the offence be punishable under section 377 of this Code, may be punished with transportation for life.

COMMENT.

This section bears the same relation to s. 388 as s. 385 bears to s. 384.

1. **'Offence'.**—The word 'offence' here denotes a thing punishable under the Code or any special or local law (s. 40).

1 *James Gardner,* (1824) 1 C. & P. 479; *Richards,* (1868) 11 Cox 43.

2 *Vide* (1866) 6 W. R. (Cr. L.) 4.

PRACTICE.

Evidence.—Prove (1) that the accused put, or attempted to put, a person in fear.

(2) That the fear was of an accusation of an offence, or an attempt to commit it.

(3) That such offence was punishable with death, transportation for life or imprisonment for at least ten years.

(4) That he did so in order to commit extortion (see s 384).

For the last provision, prove further that the accusation was of an unnatural offence (s 377).

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session

Charge.—See s. 385

Punishment.—As to crimes on the Frontier, see the Frontier Crimes Regulation (III of 1901), ss. 11 (3) (*d*) and 12 (2) As to Burma, see the Burma Laws Act (XIII of 1898), s. 4 (3) (*d*) and Sch. II

Of Robbery and Dacoity.

Robbery.

390. In all robbery there is either theft or extortion.

When theft is robbery.

Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away[1] or attempting to carry away property obtained by the theft, the offender, for that end[2], voluntarily causes[3] or attempts to cause to any person[4] death or hurt or wrongful restraint, or fear of instant death[5] or of instant hurt[6], or of instant wrongful restraint[7].

When extortion is robbery.

Extortion is robbery if the offender, at the time of committing the extortion, is in the presence[8] of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person, or to some other person[9], and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation.—The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

ILLUSTRATIONS.

(*a*) A holds Z down, and fraudulently take's Z's money and jewels from Z's clothes, without Z's consent. Here A has committed theft, and, in order to the [illegible] l wrongful restraint to Z. A has

[illegible] pistol, and demands Z's purse. Z, [illegible] has extorted the purse from Z by [illegible]g at the time of committing the extortion in his presence. A has therefore committed robbery.

(c) A meets Z and Z's child on the high-road. A takes the child, and threatens to fling it down a precipice, unless Z delivers his purse. Z, in consequence, delivers his purse. Here A has extorted the purse from Z, by causing Z to be in fear of instant hurt to the child who is there present. A has therefore committed robbery on Z.

(d) A obtains property from Z by saying—"Your child is in the hands of my gang, and will be put to death unless you send us ten thousand rupees". This is extortion, and punishable as such: but it is not robbery, unless Z is put in fear of the instant death of his child.

COMMENT.

Robbery is a special and aggravated form of either theft or extortion. 'Robbery' means felonious taking from the person of another or in his presence against his will, violence or putting him in fear[1].

The authors of the Code say: "In one single class of cases, theft and extortion are in practice confounded together so inextricably, that no judge, however sagacious, could discriminate between them. This class of cases therefore has, in all systems of jurisprudence..., been treated as a perfectly distinct class;...We have therefore made robbery a separate crime.

"There can be no case of robbery which does not fall within the definition either of theft or of extortion; but in practice it will perpetually be matter of doubt whether a particular act of robbery was a theft or an extortion. A large proportion of robberies will be half theft, half extortion. A seizes Z, threatens to murder him, unless he delivers all his property, and begins to pull off Z's ornaments. Z in terror begs that A will take all he has, and spare his life, assists in taking off his ornaments, and delivers them to A. Here, such ornaments as A took without Z's consent are taken by theft. Those which Z delivered up from fear of death are acquired by extortion. It is by no means improbable that Z's right-arm bracelet may have been obtained by theft, and left-arm bracelet by extortion; that the rupees in Z's girdle may have been obtained by theft, and those in his turban by extortion. Probably in nine-tenths of the robberies which are committed, something like this actually takes place, and it is probable that a few minutes later neither the robber nor the person robbed would be able to recollect in what proportions theft and extortion were mixed in the crime; nor is it at all necessary for the ends of justice that this should be ascertained. For though, in general, the consent of a sufferer is a circumstance which very materially modifies the character of the offence, and which ought, therefore, to be made known to the Courts, yet the consent which a person gives to the taking of his property by a ruffian who holds a pistol to his breast is a circumstance altogether immaterial"[2].

The chief distinguishing element in robbery is the presence of imminent fear or violence.

The explanation and illustrations (c) and (d) mark the distinction between simple extortion and extortion which is robbery.

1. **'Carrying away'.**—Even if death, hurt, or wrongful restraint, or fear of any of these, is caused after committing the theft in order to carry away the property obtained by theft, this offence would be committed. According to English law the force which converts theft into robbery must be used before or at the time of taking, and must be of such a nature as to show that it was intended to overpower the party robbed, and prevent his resisting, and not merely to get possession of the property stolen. Thus, if a man walking after a woman in the street were by violence to pull her shawl from her shoulders, though he might use considerable violence, it would not be highway robbery, because the violence was not for

[1] *Karali Prosad Dutta* v. *The East Indian Ry. Co.*, (1928) 48 C. L. J. 32.

[2] Note, N., p. 162.

the purpose of overpowering the party robbed, but only to get possession of the property[1].

2. **'For that end'.**—The essence of the offence is that the offender for the end of committing theft, or carrying away or attempting to carry away properties obtained by theft voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint or fear of instant death or of instant hurt or of instant wrongful restraint[2]. Death, hurt, or wrongful restraint, must be caused in committing theft, or in carrying away property obtained by theft[3]. The words "for that end" cannot be read as meaning in those circumstances as that would widen the application of the section[4] The use of violence will not convert the offence of theft into robbery unless the violence be committed for one of the ends specified in this section. Where the accused abandoned the property obtained by theft and threw stones at his pursuer to deter him from continuing the pursuit, it was held that the accused was guilty of theft and not of robbery[5].

Hurt independent of theft does not amount to robbery.—Where hurt or fear of instant hurt was caused by five or more persons for the purpose of dispossessing persons already in possession of some premises and had no relation to the commission [illegible] same time as a pe[illegible] robbery[6]. [illegible] and when the child threatened to tell his mother it was beaten, it was held that the offence committed was one of theft and not of robbery[7].

[illegible] caught B, a game-keeper, found them [illegible] of the lord of the manor. A demanded [illegible] The jury found that A acted under a bona fide impression that the game and wires were his property. It was held that A had not committed robbery[8].

3. **'Voluntarily causes'.**—These words denote that an accidental infliction of injury by a thief will not convert his offence into robbery. Thus, where a person while cutting a string, by which a basket was tied, with intent to steal it, accidentally cut the wrist of the owner, who at the moment tried to seize and keep the basket, and ran away with it, it was held that the offence committed was theft and [illegible] ly an intention, [illegible][10].

4. **'To any person'.**—The person need not be the one from whose possession the thing is taken.

5. **'Fear of instant death'.**—See s. 46, *supra*, as to the meaning of 'death'. It is not necessary that fear should be caused to the owner of the house after the robbers have entered the house. If the robbers scare away the owner on account of the fear caused in his mind before they are able to make an entry into the house the offence of robbery would be quite complete. On the other hand, where the owner of the house is scared away by a crowd of persons and the house is subsequently robbed by another crowd, acting independently of the first crowd, the offence would not be robbery[11].

1 *Thomas Gnosil*, (1824) 1 C. & P. 304.
2 *Mathura Thakur*, (1901) 6 C. W. N. 72, 79.
3 *Ruhman Khan*, (1865) 3 W. R. (Cr.) 14; *Kalio Kerio*, (1872) Cr. R., June 27, 1872, Unrep. Cr. C. 65.
4 *Karuppa Gounden*, (1916) 18 Cr. L. J. 346.
5 (1865) 1 Weir 442; *Kalio Kerio*, (1872) Unrep. Cr. C. 65, Cr. R. June 27, 1872; *Nga Po Thet*, (1917) 19 Cr. L. J. 27.
6 *Olaruddi Manjhi* v. *Kafiluddi Manjhi*, (1900) 5 C. W. N. 372.
7 *Padam Singh*, (1892) 6 C. P. L. R. (Cr.) 36.
8 *Hall*, (1828) 3 C. & P. 409.
9 *Edwards*, (1843) 1 Cox 32.
10 *Teekai Bheer*, (1866) 5 W. R. (Cr.) 93.
11 *Yamin*, (1924) 26 Cr. L. J. 145.

6. **'Hurt'.**—See s. 319, *supra*. Where A and B were stealing mangoes from a tree, C surprised them, on which A knocked him down senseless with a stick[1]; and where a person, in snatching a nose-ring, wounded the woman in the nostril, and caused her blood to flow[2], this offence was committed.

7. **'Wrongful restraint'.**—See s. 339, *supra*. The accused stopped the complainant's boat in the stream representing themselves to be persons in authority and saying that the boat was required by a Magistrate to carry treasure, and then they plundered it. It was held that they were guilty of robbery[3]. If a bailiff handcuff a prisoner under pretence of carrying him to prison with greater safety, and by means of this violence extort money, he is guilty of robbery[4].

'Restraint' implies abridgment of the liberty of a person against his will. When a person is deprived of his will power by sleep or otherwise he cannot, while in that condition, be subjected to any restraint. Where the accused locked from outside the room in which the watchmen of a building were asleep, and committed theft, it was held that the accused could not be held to have caused wrongful restraint to the watchmen and could not consequently be convicted of dacoity[5].

Where a police-officer obtained Rs. 7 from two prisoners on a promise of releasing them and threatened them that unless they gave him Rs. 200, he would confine them in the lock-up and keep them there for months while a charge of bribery against them, in respect of Rs. 7, was being investigated, and on his threat he was allowed to take certain ornaments, it was held that the offence committed was that of robbery[6].

8 **'Presence'.**—The explanation says that the offender is said to be present if he is sufficiently near to put the other person in fear of instant death, or of instant hurt, or of instant wrongful restraint.

9. **'Fear of instant death,...to some other person'.**—Imminent fear of death, hurt, etc., is necessary to bring the section into operation. If a man holds another's child over a river and threatens to throw it in unless the other gives him money, this will amount to robbery[7]. The principle of robbery is violence; where the money is delivered through fear, that is constructive violence.

CASES.

Where the accused forced an earring from the ear of a lady[8]; where the accused tore some hair from a lady's head in snatching a diamond pin from it[9]; where the accused took goods from the prosecutrix of the value of eight shillings, and by threats compelled her to take thirteen pence as payment for them[10]; where the accused, while the complainant was proceeding in a street, caught hold of the seals and chain of the complainant's gold watch and pulled the watch out of his *fob* and by giving two or three jerks broke the steel chain with which it was attached and then made off with it[11]; and where a person ran up against another for the purpose of diverting his attention while he picked his pocket[12], it was held that the force was sufficient to constitute the offence of robbery.

391. When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery[1], and persons present and

Dacoity.

1 *Hushrut Sheik*, (1866) 6 W. R. (Cr.) 85.
2 *Teekai Bheer*, (1866) 5 W. R. (Cr.) 95.
3 *Dulcclooleen Sheikh*, (1866) 5 W. R. (Cr.) 19.
4 *Samuel Gascoigne*, (1783) 1 Leach 280.
5 *Fateh Muhammad*, (1927) 28 Cr. L. J. 602.
6 *Basant Rai*, (1896) P. R. No. 12 of 1896.
7 2 East P. C. 735, 736.
8 *James Lapier*, (1784) 1 Leach 320.
9 *Robert Moore*, (1784) 1 Leach 335.
10 *Simons*, (1773) 2 East P. C. 712.
11 *George Mason*, (1820) R. & R. 419.
12 *Anon.*, (1825) 1 Lewin 300.

aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

COMMENT.

Dacoity is robbery committed by five or more persons. Abettors who are present and aiding when the crime is committed are counted in the number. The number of persons concerned in the robbery must not be less than five.

The essentials of the offence of dacoity are that the theft should be perpetrated by means either of actual violence or of threatened violence. The threatened violence may be implied in the conduct and character of the mob. It is not necessary that the force or menace should be displayed by any overt act. It cannot avail the accused to say, or reduce the gravity of their offence, that no actual hurt was caused as no one dared to resist the overwhelming show of force, which was sufficient to terrify, and did in fact terrify, those whose business it was to protect the property[1].

The authors of the Code say. "We have provided punishment of exemplary severity *for the atrocious crime which* is designated in the Regulations of Bengal and Madras by the name of Dacoity. This name we have thought it convenient to retain, for the purpose of denoting, not only actual gang-robbery, but the attempting to rob when such an attempt is made or aided by a gang"[2]. The [illegible] utrage committed, at the very dead of [illegible] ere covered and whose faces were dis[illegible] who had no private enmity with the peaceable and unfortunate house-holder, whom some one of the gang had previously, by secret enquiries, marked out for a prey

Under this section the number of persons committing robbery must be five or more. Where the evidence showed that there were six robbers but at the trial three were acquitted, it was held that a conviction under this section was not sustainable, and that the accused should be convicted under s. 392[3].

1. 'Conjointly commit or attempt to commit a robbery'.—Where the accused did not actually take part in the dacoity but was with others before the dacoity and went with one of the dacoits to borrow a boat, and during the dacoity was left in the boat at a place some five or six miles from the place of the dacoity and was told to wait for other dacoits, it was held that the accused's action did not come within the definition of dacoity as he was not present though he might have been aiding such commission or attempt[4]. A dacoity begins as soon as there is an attempt to commit robbery and a shot fired thereafter in order to keep off a rescue party and to allow the theft to be committed is an act committed in committing the dacoity within the meaning of this section[5].

Dacoity is either theft or extortion.—If no property is carried off, there is no dacoity but an offence under s. 402[6]. Where several Hindus acting in concert forcibly removed an ox and two cows from the possession of a Mahomedan, not for the purpose of causing wrongful gain to themselves or wrongful loss to the [illegible] ows, it was [illegible] in a sub[illegible] the parti[illegible] in concert

[1] *Chandra Krishna*, (1908) 10 Bom. L R. 632.

[2] Note N, p. 163.

[3] *Pedda Enumandugaru*, (1910) 7 M. L. T. 340; *Ikram-ud-din*, (1917) 39 All. 348; *Girdhar*, (1927) 27 Cr. L. J. 547; *Abbas Ali Sahib*, (1927) 53 M. L. J. 732, [1927] M. W. N. 853.

[4] *Ibrahim*, (1925) 42 C. L. J. 496.

[5] *Sitaram*, (1925) 26 Cr. L. J. 1304.

[6] (1868) 9 W. R (Cr. L.) 5.

[7] *Ragunath Rai*, (1892) 15 All. 22.

and apparently under the influence of religious feeling attacked certain Mahomedans who were driving cattle along a public road and forcibly deprived them of the possession of such cattle under circumstances which did not indicate any intention of subsequently restoring the cattle to the Mahomedans, it was held that they were guilty of dacoity. The Court said: "The Indian Penal Code is a statute of the Legislature applicable to Muhammadans, Hindus, Christians and all other sects alike. It is necessary in every civilized state that in order to protect the lives and property of the members of the community penal laws should exist and be enforced, and should be enforced no matter whether the person who commits an offence against them is a Christian, or a Muhammadan, or a Hindu or member of any other religious denomination. Penal laws are made for the protection of all classes alike, and they do not recognize any exception in the case of any particular denomination. A theft or a dacoity would not be any the less a theft or a dacoity if committed by members of one denomination upon the members of another; for example, no Christian or Muhammadan could plead in a Court of justice that he was not liable to be punished for theft because he acted under the incentive of some religious motive, if the facts showed that theft had in reality been committed. There must, in all states in which law and order are to abide, be penal laws equally enforceable against every denomination; and it is further necessary, unless we are to return to barbarous times, that persons who choose to wage a species of civil war on their neighbours should be adequately punished, not only as a punishment to themselves, but as a warning to deter others from committing similar offences. A cow is an animal which in this country a Muhammadan is entitled to hold as his property and over which he is entitled to exercise all the lawful rights of an owner, and so long as that Muhammadan in dealing with his own property does not, in the exercise of his rights of ownership, commit an offence against the Indian Penal Code, the law must and will protect him in the exercise of his rights. Similarly the law will protect a Hindu or a member of any other denomination in the exercise of his rights of property. If a Muhammadan, a Hindu or a Christian or a member of any other denomination commits an offence against the Penal Code, the law can be put in force against him by the process of the Criminal Code and by that process only. If he does not commit an offence in exercising his rights of property the law does not allow any one to interfere with him in the exercise of those rights, and people who take upon themselves either to take the law into their own hands, or to override or exceed the law, must expect the punishment which the law awards for criminal acts"[1]. Where it was established that the common object of certain Mahomedan rioters was both to hurt any member of the Hindu community whom they might happen to find and to rob the shops and houses of the Hindus, it was held that any person who was proved to have taken part in the disturbance must be found guilty not only of the offence of riot but of the offence of dacoity[2].

Good faith.—When all that is done under a claim of right in good faith entertained by the accused, however erroneously, the charge cannot be sustained[3].

Abetment.—Knowing of a design to commit a dacoity, and voluntarily concealing the existence of that design, with the knowledge that such concealment will facilitate the commission of dacoity, does not amount to an abetment of the dacoity[4].

Fear of instant death, or of hurt, or of wrongful restraint.—Imminent fear of death, hurt, etc., will be sufficient to bring the section into operation. Where several persons attacked a house and took away property, but the inmates obtaining information beforehand had fled before the attack, it was held that the

1 *Ram Baran,* (1893) 15 All. 299, 301.
2 *Daulat,* (1926) 3 O. W. N. 304.
3 *Karaka Nachiar,* (1866) 3 M. H. C. 254.
4 *Jhugroo,* (1865) 4 W. R. (Cr.) 2.

fact of the inmates running away was sufficient proof of the fear of hurt or of wrongful restraint and the accused were guilty of dacoity[1].

392. Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

Punishment for robbery.

COMMENT.

This section specifies the punishment which can be inflicted in case of simple

PRACTICE.

Evidence.—Prove (1) that the accused committed theft (*vide* s. 379 for the points to be proved)

(2) That he caused or attempted to cause to some person (*a*) death, hurt, or wrongful restraint; or (*b*) fear of instant death, of instant hurt, or of instant wrongful restraint.

(3) *That he did as above (a) in committing such theft, or (b) in order to* commit such theft; or (*c*) in carrying away, or attempting to carry away, the property obtained by such theft.

(4) That he acted as in (2) voluntarily.

Or prove—

(1) That the accused committed extortion (*vide* s. 384 for the points to be proved).

(2) That he was, at the time of committing it, in the presence of the person so put in fear.

(3) That he committed it by putting that person or some other person in fear of instant death, or of instant hurt, or of instant wrongful restraint

(4) That he thereby induced the person so put in fear to deliver up then and there the thing extorted.

As an example of relevant facts, see ill. (*a*) to s. 7, and ills. (*f*) and (*h*) to s. 8 of the Indian Evidence Act.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable

may be

separat

houses, they must be tried separately on each of the three charges[3].

It is not open to a Magistrate to split up a graver offence into a number of smaller offences which, when combined, constitute that offence, in order to give himself jurisdiction[4].

[1] *Kissorree Pater*, (1867) 7 W. R. (Cr.) 35, [53]

[2] Illustration (*m*), s. 235, Criminal Procedure Code.

[3] *Ituaree Dome*, (1866) 6 W. R. (Cr.) 83.

[4] *Olaruddi Manjhi* v. *Kafiluddi Manjhi*, (1900) 5 C. W. N. 372.

Punishment.—In robbery, the legislature has provided three different degrees of punishment which may be inflicted. Under s. 392, the punishment may be extended to fourteen years' imprisonment. It is not permissible to award a sentence of fine only without imprisonment for the offence of robbery[1]. Under s. 394, it may be extended to transportation for life, and under s. 397, it cannot be less than seven years. Section 392 is the general section, and the two other sections specify the same offence under aggravated circumstances. See the Whipping Act (IV of 1909), s. 4. A sentence of whipping may be imposed where, in the commission of a robbery, hurt is caused. As to Burma, see the Burma Laws Act, 1898, s. 4 (3) (*b*) and Sch. II. As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6 and 11 (3) (d) and 12 (2). As to members of a criminal tribe or gang, see the Criminal Tribes Act, 1897, s. 6, Schedule.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*), as follows :—

That you, on or about the——day of——, at——, robbed (*state the name*) and thereby committed an offence punishable under s. 392 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge[2].

393. Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Attempt to commit robbery.

COMMENT.

This is a specific section for punishing attempt to commit robbery. A present intent to rob combined with an act in execution of such intention which falls short of the offence intended, is an attempt to rob.

PRACTICE.

Evidence.—Prove that the accused attempted to commit robbery.

As to what constitutes an attempt, see s. 511, *infra.*

As to the points requiring to be proved for robbery, see. s. 392.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Punishment.—As to Burma, see the Burma Laws Act (1898), s. 4 (3) (*b*) Sch. II. As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11, (3) (*d*), and 12 (2).

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——at——, did an act, to wit——, and which amounted to an attempt to rob AB and thereby committed an offence punishable under s. 393 of the Indian Penal Code and within my cognizance (*or* the cognizance of the Court of Session, *or* High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

394. If any person, in committing or in attempting to commit robbery, voluntarily[1] causes hurt[2], such person, and any other person jointly concerned[3] in committing or attempting to commit

Voluntarily causing hurt in committing robbery.

1 *Badri Prasad*, (1922) 44 All. 538.

2 Criminal Procedure Code, Sch. V, xxviii, (9).

such robbery, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

is grievous[1].

1. **'Voluntarily'.**—See s. 39, *supra.*

2. **'Hurt'.**—*See* s. 319, *supra.*

3. **'Jointly concerned'.**—The guilty act of one is imputed to all who are joint with him, provided the act is done in committing the offence of robbery. Violence or hurt entirely unconnected with that offence or used to gratify personal spite or passion is not contemplated.

This section, and not s. 397, will apply to the case of a robber who does not himself cause grievous hurt or use any deadly weapon[2].

PRACTICE.

Evidence.—Prove (1) that the accused, or someone jointly concerned with him, committed or attempted to commit robbery[3].

(2) That the accused, or such other person, voluntarily caused hurt[4] in doing so.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

As an offence punishable under this section necessarily includes the offence punishable under s 392, an accused person who is convicted under both these sections can legally be punished only under this section and in such a case it would be sufficient to convict him under this section alone[5] But see ill. (*m*) to s. 235 of the Code of Criminal Procedure which says· "A commits robbery on B, and in doing so voluntarily causes hurt to him A may be separately charged with, and convicted of, offences under ss. 323, 392, and 394 of the Indian Penal Code".

Separate convictions are, according to this illustration, justifiable.

In cases where the offender attempts to cause hurt, or causes wrongful restraint, or fear of death, hurt or wrongful restraint, a charge cannot be framed against him under this section. Section 392 would be the only section applicable. But when the fact which transmutes theft into robbery is the voluntarily causing hurt, then, [illegible] tion should be [illegible] of this sectior [illegible] ould be under tl [illegible] ict; [illegible] committed that

[illegible] g of hurt changes [illegible] ction for causing

[1] *Mohna alias Kohara,* (1901) P. R. No. 16 of 1901.

[2] *Arunachella Thevan,* (1911) 22 M. L. J. 186.

[3] *Vide* s. 392, sup.

[4] *Vide,* s. 323, sup.

[5] *Durga,* (1890) Cr. R. No. 31 of 1890, Unrep. Cr. C. 511; *Mootkee Kora,* (1865) 2 W. R. (Cr.) 1.

[6] *Nga Po Lon,* (1902) 1 L. B. R. 232.

[7] (1865) 2 W. R. (Cr L.) 6.

Commitment.—If a Magistrate finds that an accused person had caused grievous hurt in committing robbery, he is bound to commit him to the Court of Session for an offence under s. 397; it is illegal to treat the grievous hurt as simple hurt and convict the accused under this section[1].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed (*or* attempted to commit (*or* were jointly with XY concerned in committing)] (*or* attempting to commit) robbery of the property of AB, and that as such you (*or* XY) voluntarily caused hurt to AB (*or*——), and that you thereby committed an offence punishable under s. 394 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge[2].

Punishment.—As to Burma, see the Burma Laws Act (1898), s. 4 (3) (*b*) and Sch. II. As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (*d*) and 12 (2).

Whipping.—Before a sentence of whipping in addition to imprisonment can be passed on the accused, there must be a finding that he himself caused hurt while committing the robbery[3].

Punishment for dacoity.

395. Whoever commits dacoity shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section prescribes punishment for simple dacoity; s. 396, for dacoity accompanied with murder; s. 397, for dacoity with attempt to cause death or grievous hurt; s. 398, for attempt to commit dacoity when the offender is armed with a deadly weapon; s. 399, for making preparation to commit a dacoity; s. 400, for belonging to a gang of dacoits ;] and s. 402, for assembling for the purpose of committing dacoity.

PRACTICE.

Evidence.—Prove (1) that robbery was committed or attempted[4].

(2) That five or more persons committed or attempted to commit robbery: or that the whole number of persons committing or attempting to commit robbery was five or more[5].

(3) That such persons were acting conjointly.

As to the nature of evidence requisite to be taken in a case of dacoity, see the cases of *Modhoo Manjee*[6], *Ram Sagor*[7] and *Kamal Fukeer*[8]. In dacoity cases evidence adduced as to the identification of dacoits ought not to be accepted too readily, but should be looked at with great caution[9].

Presumption.—When a prisoner is apprehended eight days after a dacoity with part of the plunder in his possession, there is a good ground for charging him with the dacoity as with having received or retained with guilty knowledge, and he ought to be charged in the alternative form[10]. When persons are found,

1 *Jobania*, (1889) Unrep. Cr. C. 476, Cr. R. No. 36 of 1889. But see *Surji Doss*, (1888) 1 Weir 449.
2 (1865) 2 W. R. (Cr. L.) 6.
3 *Po Thaung*, (1927) 6 Ran. 48.
4 *Vide* s. 392, sup.
5 *Shera*, (1868) P. R. No. 18 of 1868.
6 (1866) 5 W. R. (Cr.) 51.
7 (1867) 8 W. R. (Cr.) 57.
8 (1872) 17 W. R. (Cr.) 50.
9 *Kallu*, (1917) 18 Cr. L. J. 456.
10 *Motee Jolaha*, (1866) 5 W. R. (Cr.) 66.

within six hours of the commission of a dacoity, with portions of the plundered property in their possession, the presumption of law is that they are participators in the dacoity[1].

Where eight persons were each of them separately charged with dacoity, but the jury acquitted four of them but found the other four guilty, the evidence before them being that there were more than five persons concerned in the offence even if the four who were acquitted were not there, it was held that the charge as [illegible] f the accused that they were [illegible] the jury of dacoity would [illegible] engaged with each dacoit. [illegible] nvict four of the accused actually charged would not in any way affect the question of the number of persons engaged[7].

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

A person convicted of dacoity under s. 395 cannot be convicted also of dishonestly receiving stolen property under s 411, or of receiving property transferred by commission of dacoity under s 412, when there is no evidence of the commission of more than one offence[3].

Direction to jury.—In a case of dacoity the Judge should direct the jury to convict only if they find that all the prisoners had the intention of causing wrongful gain or loss to the prosecutor[4]. The jury must be distinctly instructed that unless they are satisfied that there were five or more persons committing the robbery or that the persons present and aiding in the commission of the robbery numbered five or more persons, there could be no dacoity[5].

Attempt.—Section 511 of the Indian Penal Code does not apply to a case of dacoity. An attempt to commit dacoity should be charged under this section as the definition of 'dacoity' includes attempt[6].

Abetment.—An abettor of dacoity is punishable under this section and s 109 without any reference to s 397 which is applicable only to persons actually committing a dacoity in which one of the acts specified in it is done[7]

Charge.—I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed dacoity, an offence punishable under s. 395 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge[8].

Punishment.—A sentence of fine only is illegal[9]. Sentence of transportation under this section must be either for life or for a period not exceeding ten years if given in lieu of imprisonment[10].

Where a person, notwithstanding a previous conviction of dacoity and consequent punishment and after having a *locus pœnitentiœ* afforded him, again, after completing a previous term of sentence, commits the same offence, he shall be liable to whipping in addition to any sentence of imprisonment awarded. He has, that is to say, been undeterred by imprisonment, and therefore may be punished on the second occasion with stripes in addition[11].

[5] *Moolkandi*, (1903) 1 Weir 446.
[6] *Koonèe*, (1867) 7 W. R. (Cr.) 48
[7] *Chatur Singh*, (1901) P. R. No. 15 of 1901.
[8] Criminal Procedure Code, Sch. V., XXVIII (1) (10).
[9] *Bhoja*, (1866) 6 W. R. (Cr) 54
[10] *Arura*, (1903) 1 Cr. L. J. 89, P. R. No. 31 of 1903.
[11] *Udai Patnaik*, (1869) 4 Beng. L. R. (A. Cr J.) 5; *La Saing*, (1907) 14 Burma L. R. 186

In awarding sentence in a case of riot and dacoity committed while the accused were smarting with indignation against the outrages upon their sacred places, every allowance should be made for their feelings and a comparative leniency shown, though they must be punished adequately, it being also taken into consideration that the persons injured in the riot and robbed had no share in desecrating the holy places and were made to suffer for the sins of others[1].

As to Burma, see the Burma Laws Act (1898), s. 4 (1) (?), and Sch. III; as to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 8, 11 (3) and (?) 12 (2).

395. If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or transportation for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Dacoity with murder.

COMMENT.

Object.—In providing this section the object of the legislature seems to be that the extreme penalty of death may be inflicted on a person convicted of taking part in a dacoity in the course of which a murder is committed, even though there is nothing to show that he himself committed the murder or that he abetted it.

Ingredients.—The first essential of an offence under this section is that the dacoity is the joint act of the persons concerned; and the second essential of the offence is that the murder is committed in the course of the commission of the dacoity in question[2].

1. 'Conjointly committing dacoity, commits murder, etc.'—The Allahabad High Court once ruled that in order to support a conviction under this section it was necessary to establish not only that the accused had committed dacoity conjointly with others, but it must also be shown that the murder had been committed in his presence[3]. But it has subsequently held that when, in the commission of a dacoity, a murder is committed, it matters not whether the particular dacoit was inside the house where the dacoity is committed, or outside the house (as in the above case of *Umrao Singh*), or whether the murder was committed inside or outside the house, so long only as the murder was committed in the commission of that dacoity[4]. This ruling has been followed by the Bombay High Court[5] and the former Chief Court of the Punjab[6]. If a dacoit in the progress of, and in pursuance of, the commission of a dacoity, commits a murder, all of his companions, who are participating in the commission of the same dacoity, may be convicted under this section, although they may have no participation in the murder beyond the fact of participation in dacoity[7]. The common object of an assembly was to commit a dacoity, and there was a general purpose to resist all opposers even, if necessary, to the point of death. This unlawful assembly did actually commit dacoity, and while retreating on the advent of villagers in superior force, one of its members shot and killed one of the villagers. It was held that as the murder was committed in effecting a safe retreat it should be ascertained whether the retreat was so separated by time or space from the offence which formed the common object of the assembly as not to form part of it; but as there was no such separation in that particular case and the retreat was an

1 *Daulat*, (1888) 8 C. W. N. 314.
2 *[illegible]*, (1912) [illegible] C. W. N. [illegible].
3 *Umrao Singh*, (1894) 16 All. 437.
4 *Teja*, (1895) 17 All. 86.
5 *Girya Lamnaya*, (1914) [illegible] Bom. L. R. 248.
6 *Chattan*, (1900) P. R. No. 4 of 1900.
7 *Ibid.*

essential part of the common criminal purpose, it was a continuation of the actual dacoity, and the murder must be taken to have been committed in prosecution of the common object of the assembly[1]. Murder committed by dacoits while carrying away stolen property is 'murder committed in the commission' of dacoity[2].

Where, after the commission of a dacoity, in which the dacoits, being interrupted by villagers, did not get any plunder, the dacoits while attempting to ... -illed ... the ... This

If a person concerned in a dacoity unintentionally commits murder he is liable to punishment under this section, but he cannot be separately convicted of murder under s. 302 and of dacoity under s. 395[4].

PRACTICE.

Evidence.—Prove (1) the commission of dacoity[5].

If this was not the object of the accused there would be no conviction under this section[6].

(2) That one of the accused committed murder[7].

(3) That the murder was committed during the commission of dacoity.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session

If, when a dacoity is planned, murder is contemplated from the first and is committed in the dacoity, any person, who joins in the conspiracy, is liable under s. 302 read with s 109 to transportation for life, even if he does not eventually join in the commission of the dacoity with the other conspirators[8].

"If an accused takes part in any dacoity accompanied with murder, the proper section of the Penal Code to apply to him is s 396 in addition to s 400, and he is liable to be sentenced to death, or transportation for life, or ten years' rigorous imprisonment and fine. If he has not rendered himself liable to this extent, a distinction must still be made between those dacoits who, though belonging to an organized band, have only recently joined it, and have perhaps not taken part in more than one or two dacoities at the utmost, and those who have belonged to a gang for years and have taken part in many dacoities; between those who

are afraid to surrender, and who inflict no injury upon the people beyond that of depriving them of a few fowls and baskets of paddy, the food they are in search of"[9].

Charge.—I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed dacoity, and that, in the commission of such dacoity, murder was committed by one of your number, and that you thereby committed an offence punishable under s. 396 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge[10].

[1] *Sakharam Khandu*, (1900) 2 Bom. L. R.

[5] *Vide* s. 395, sup.

[6] *Mathura Thakur*, (1901) 6 C. W. N. 72; *Arshed Molla*, (1919) 29 C. L. J. 325.

[7] *Vide* s. 300, sup.

[8] *Sukhra*, (1896) 10 C. P. L. R. (Cr.) 20.

[9] Per Ward, J. C., in *Nga Lu Nge Gyi*, (1889) S. J. L. B. 441, 442.

[10] Vide *Muttirulappan*, (1878) 1 We

Punishment.—As to Burma, see the Burma Laws Act (1898), s. 4 (3) (*b*) and Sch. II. As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (*b*) and 12 (2).

The offence of conspiracy is a separate offence from the offence of participation in a particular dacoity or the dishonest reception of property stolen in a dacoity knowing it to be stolen. Separate sentences can of course be awarded to run consecutively for participation in separate dacoities and to these can also be added a consecutive sentence of participation in conspiracy[1].

Robbery or dacoity, with attempt to cause death or grievous hurt.

397. If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt[1] to any person[2], or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

COMMENT.

Object.—This section is merely a rider to s. 394. It does not create any substantive offence. It is complementary to ss. 392 and 395 which creates the substantive offences. It merely regulates the punishment already provided for dacoity, by fixing a minimum term of imprisonment when its commission has been attended with certain aggravating circumstances, viz., (1) use of a deadly weapon, or (2) causing of *grievous* hurt, or (3) *attempting to* cause death or grievous hurt. The provisions of this section are obligatory as "the imprisonment with which such offender shall be punished shall not be less than seven years"[2].

1. 'The offender uses any deadly weapon, or causes grievous hurt'.—A very wide interpretation was put upon the expression 'uses a deadly weapon' by the former Chief Court of Lower Burma. It held that this expression must include the carrying of a weapon for the purpose of overawing the person robbed. "It may be argued", observed Twomey, J., "that to 'use' a stabbing weapon is to stab some person with it, to 'use' a cutting weapon is to cut some person with it, and to 'use' a gun is to shoot at some person with it. According to this narrow interpretation, brandishing a dagger or levelling a gun at a man might be regarded as merely *threatening* to use or *preparing* to use it, not as actually using it. But it is not clear that the word 'uses' in s. 397 should be interpreted with such strictness. The very next s. 398 imposes a minimum punishment of seven years' imprisonment on persons convicted of merely carrying a deadly weapon when attempting to rob. It seems probable that the Legislature intended to impose the same minimum where the robbery is actually completed. I am inclined to think therefore that the word 'uses' in s. 397 should be construed in a wide sense so as to include not merely cutting, stabbing, shooting (as the case may be) but also carrying the weapon for the purpose of overawing the person robbed. It is no doubt at first sight remarkable that wider language is employed in s. 397 ('uses any deadly weapon') than in s. 398 ('is armed with any deadly weapon'). The explanation is apparently that in attempted robberies it is often difficult to prove any 'use' of the deadly weapon except the mere fact that the accused carried it, whereas in a case of completed robbery it generally happens that the accused not only carries the deadly weapon but also overawes the person robbed or even stabs, cuts or shoots at him. The wider view of s. 397 is supported by a passage in Maxwell's Interpretation of Statutes[3]:—If he [a man] walks with a gun with intent to kill game, he 'uses' the gun for that purpose without firing, within the statute:

1 *Hazari Beria,* (1928) 5 O. W. N. 985. 25 Cr. L. J. 259.
2 (1867) 7 W. R. (Cr. L.) 2; *Wadhwa,* (1923)
3 7th Edition, p. 240.

which makes using a gun with that intent penal' English and American authorities are given for this interpretation....If the accused had merely attempted to take the complainant's property by overawing him with a dagger but (owing to infirmity of purpose on his own part or resistance on the part of the complainant) had not carried out his design, he would undoubtedly be liable to the minimum punishment provided in s. 398 The Legislature cannot have intended that if the criminal goes a step farther and actually accomplishes his purpose he should thereby establish a claim to more lenient treatment It cannot have been intended that a criminal should be urged to complete his criminal purpose by the reflection that if he stops short at an attempt he must get seven years, while if he completes the offence he may get off with imprisonment for two or three years"[1]

According to the Bombay[2], Calcutta[3], Madras[4] and Rangoon[5] High Courts the liability to an enhanced punishment is limited to the offender who actually causes grievous hurt or uses a deadly weapon, and not to the case of persons associated with such offender in the commission of the offence The words "offender" and "*such* offender" refer only to the persons who are proved to have actually 'used' deadly weapons and not to the others who in combination with such persons have committed robbery or dacoity. Section 34 has no application in the construction of this section though it may be read with ss. 392 and 395 to determine the substantive offence which is created[6] In one case the Allahabad High Court held that the words "such offender" include any person taking part in the dacoity who, though he may not himself have struck the blow causing the grievous hurt, is nevertheless liable for the act by reason of s 34[7]. But, subsequently, in the [illegible]
vie [illegible]
to [illegible]
themselves caused grievous hurt. It does not apply to such persons taking part in a dacoity as may be liable for grievous hurt, committed by one of the party only in virtue of s. 34[8]. This latter decision has been subsequently followed by the same High Court in preference to the former[9]. The former Chief Court of the Punjab[10] adopted the view expressed in *Mahabir Tiwari's* case[11]. The Lahore High Court has in one case[12] followed in the footsteps of the former Chief Court of the Punjab, but in subsequent cases[13] has given up the old path and adopted the later view of the Allahabad High Court. In a recent case it says: "All the High Courts in India have now taken the same view as to the applicability of s. 34 in dealing with punishment which may be awarded under s 397, Indian Penal Code, and it now may be said to be finally established that s 34 of the Code has no application in the construction of s 397"[14].

The Chief Court of Oudh has adopted the later view of the Allahabad High Court[15].

[1] [illegible]

C. P. L R. 97

[3] *Ali Mirza*, (1923) 51 Cal. 265

[4] *Arunachella Thevan*, (1911) 22 M L. J 186; *Komali Viswasam*, (1886) 1 Weir 450.

[5] *Nga Pu*, (1926) 5 B. L J.103; *Nga Sein*, (1905) 3 L. B. R 121; *Po Win*, (1913) 7 L. B R. 26; *Po Myaing*, (1920) 10 L. B R. 269.

[6] *Ali Mirza*, (1923) 51 Cal. 265.

[7] *Mahabir Tiwari*, (1899) 21 All. 263. In *Ghassu*, (1924) 25 Cr. L. J. 1181, the Court of Judicial Commissioner, Nagpur, adopted this view differing from an earlier decision, *Bhura Ahir*, (1903) 16 C P L. R. 97

[8] *Senta*, (1899) 19 A. W. N. 186.

[9] *Nageshwar*, (1906) 28 All. 404; *Danna*, (1927) 29 Cr L J. 449.

[10] *Mohna*, (1901) P. R. No. 16 of 1901; [illegible]

[illegible] *ohar* [illegible]

3 O. C. 263.

'Deadly weapon'.—See s. 448, *infra*. A *lathi* is not a deadly weapon within the meaning of this section[1].

'Grievous hurt'.—See s. 319, *supra*.

'Person'.—See s. 11, *supra*.

Violence should have been used in committing robbery or dacoity.—The accused fractured one of the arms of a woman by striking one or two blows with a stick, and thereby causing her to fall to the ground, his object being to steal the pony on which she was riding. He then attempted to mount and ride off on the pony but was prevented from doing so by the girth of the pony's saddle breaking. It was held that this section was applicable[2].

The accused and another attacked a man and beat him with clubs. There was no evidence as to which of them it was who struck the blow which broke his finger. It was held that the accused were not liable to enhanced punishment under this section[3].

Where several persons were found endeavouring to break into a house, and some of them, being armed, used violence, but only in attempting to escape being arrested, it was held that they could not properly be convicted under this section read with s. 511[4].

PRACTICE.

Evidence.—Prove (1) the commission of robbery[5] or dacoity[6];

In the case of robbery a conviction under this section is equally good, whether the number of the accused be five or under[7].

(2) That the accused used a deadly weapon; or caused grievous hurt; or attempted to cause death or grievous hurt.

(3) That the above acts were done during the commission of robbery or dacoity.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Where, in a case of robbery, there is no intention of causing death or such bodily injury as is likely to cause death, the conviction must be under this section of "voluntarily causing grievous hurt in committing robbery"[8].

Charge.—In the charge the carrying of arms must be distinctly alleged. Where the accused are charged with, and convicted of, an offence punishable under s. 395, they cannot be punished under s. 398 of the Code[9]. This section does not create a substantive offence and a Court, therefore, should not frame a charge under it but under s. 392 read with s. 397, or s. 395 read with s. 397, as the case may be[10].

The charge should be for the substantive offence of robbery or dacoity, and the following clause should be added to the charge.

And that at the time of committing the said robbery (*or* dacoity) you used a deadly weapon, to wit——(*mention the deadly weapon*), [*or* caused grievous hurt to AB, or attempted to cause death or grievous hurt to AB], and thereby committed an offence punishable under s. 397 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

1 *Lal Khan*, (1912) P. L. R. No. 117 of 1912.
2 *Hamaman*, (1900) P. R. No. 6 of 1901.
3 *Bhagwant*, (1900) 3 O. C. 283.
4 *Beni*, (1900) 23 All. 78.
5 *Vide* s. 392, *sup*.
6 *Vide* s. 395, *sup*.
7 *Durbin Khan*, (1865) 2 W. R. (Cr.) 42.
8 *Chabir Haza*, (1866) 6 W. R. (Cr.) 16.
9 *Punya Sakharam*, (1897) Cr. R. No. 25 of 1897, Unrep. Cr. C. 921.
10 *Bhagwant*, (1900) 3 O. C. 283; *The Emn.* (1904) 1 Cr. L. J. 475; *Darpar Khan*, (1922) 5 L. L. J. 224; *Po Mying*, (1920) 10 L. B. R. 292.

Punishment.—The maximum term of imprisonment that can be passed under this section cannot exceed ten years (see. s. 396)[1]. The minimum is seven years[2].

398. If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.

Attempt to commit robbery or dacoity when armed with deadly weapon.

COMMENT.

This section does not by itself create a substantive offence, but only regulates the measure of punishment when certain facts are found to exist in the commission of the substantive offence of robbery[3].

To such of the offenders as are armed with deadly weapons, though they do not use them in the attempt to rob or commit dacoity, an imprisonment of not less than seven years must be awarded. It is the terror which the possession of a deadly weapon naturally creates that has led the legislature to provide for a severe sentence where the offender has such a weapon.

It is necessary to show that at the time of committing robbery the accused was armed with a deadly weapon and not merely that one of the robbers who was with the accused at the time carried one[4]. The words "offender" and "such offender" refer only to the persons who are proved to have actually been "armed with" deadly weapons and not to the others who in combination with such persons have committed robbery or dacoity Section 34 has no application in the construction of this section, though it may be read with ss. 392 and 395 to determine the substantive offence which is created[5].

PRACTICE.

Evidence.—Prove (1) the attempt to commit robbery or dacoity.

(2) That the accused was armed with a deadly weapon

(3) That he was so armed when the robbery or dacoity was committed.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Abetment.—A person cannot be convicted of abetting an offence under this section. The appropriate section for abetment should be ss 393, 114. Where a person was convicted under this section for abetment and the charge was not amended by the Session Court, the charge was altered on appeal into one under ss. 393-114[6].

Charge.—See the last section.

Punishment.—As to Burma, see the Burma Laws Act (1898), s. 4 (3) (*b*) and Sch. II. As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (*d*), and 12 (2).

399. Whoever makes any preparation[1] for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Making preparation to commit dacoity.

[1] *Nama Dulab*, (1908) Criminal Revisional Application No. 223 of 1908. Decided on July 30, 1908. (Unrep. Bom.)

[2] *Radhia*, (1927) 9 P. L. T. 572.

[3] *Nabibux*, (1927) 30 Bom. L. R. 88, 9 Bom. Cr. C. 193, 52 Bom. 168.

[4] *Bhariya*, (1895) Cr. R. No. 54 of 1895, Unrep. Cr. C. 797; *Deoji Keru*, (1872) Unrep. Cr. C. 65, followed.

[5] *Ali Mirza*, (1923) 51 Cal. 265; *Nabibux*, sup.

[6] *Nga Pu*, (1926) 5 B. L. J. 103.

COMMENT.

Under the Code, mere preparation to commit an offence is punishable in three cases: (1) preparation to wage war against the King (s. 122); (2) preparation to commit depredation on territories of a power at peace with the King (s. 126); and (3) preparation to commit dacoity. Preparation to commit any other offence, such as house-breaking or robbery, is not an offence[1].

1. 'Makes any preparation.'—These words point to acts done prior to a commencement of the execution of the guilty purpose and it may be before any particular dacoity is planned. It will be enough if there is a general design to commit dacoity, or to engage in an expedition for this purpose, though the plans of the dacoits are not yet matured. The making of 'preparation' should be shown to the satisfaction of the Court by some act, such as the collection of men, arms, provisions, etc., which, coupled with other circumstances, plainly manifest the intention to commit dacoity[2]. A mere assembling without further preparation is not a preparation within the meaning of this section. Mere assembling without proof of other preparation is punishable under s. 402. A person may not be guilty of dacoity, yet guilty of preparation, and not guilty of preparation yet guilty of assembling[3]. In order to constitute preparation it is not necessary that an overt act towards the commission of dacoity should have been done. The law requires that the accused should have done some act to get ready for committing dacoity. Where it is found that the members of a gang had taken in their possession instruments for house-breaking and arms for the purpose of offence and defence and had actually proceeded to a place near the scene of the contemplated dacoity, the Court is justified in holding that there was not a mere assemblage but that the members of the assemblage had got ready for the actual commission of a dacoity[4].

In order to establish an offence under this section, it is not necessary that the persons shown to be making the preparation should be five or more in number. But it is necessary to prove that the raid for which they were making preparation was to be committed by five or more persons. Otherwise it would not be dacoity but merely robbery, and mere preparation for committing robbery, unless it ends in an actual attempt, is not punishable by law[5].

As to the distinction between preparation and attempt, see s. 511, *infra*.

PRACTICE.

Evidence.—Prove (1) that the act of the accused amounted to preparation.

(2) That it was preparation to commit dacoity.

Where one of the prosecution witnesses in a case under this section had been in the company of the accused persons at the time when plans for committing dacoity were made and took part in the preparation therefor, he was an accomplice and his evidence could not be accepted as sufficient, without corroboration[6].

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——; made preparation, to wit ——, for committing dacoity, and thereby committed an act punishable under s. 399 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

1 *Shera*, (1868) P. R. No. 18 of 1868.
2 M. & M. 357; *Karmun*, (1915) P. R. No. 6 of 1915, P. W. R. (Cr.) No. 37 of 1916.
3 *Ramesh Chandra Banerjee*, (1913) 41 Cal. 350.
4 *Karmun*, sup.; *Indar Singh*, (1926) 8 L. L. J. 406, 27 P. L. R. 752.
5 *Khwaja Hassan*, (1922) 24 Cr. L. J. 136.
6 *Karim Baksh*, (1927) 9 Lah. 550.

Punishment.—As to Burma, see the Burma Laws Act (1898), s. 4 (3) (*b*) and Sch. II. As to the Frontier District, see the Frontier Crimes Regulation (III 1901), ss. 6, 11 (3) (*d*) and 12 (2).

400. Whoever, at any time after the passing of this Act, shall belong[1] to a gang of persons associated for the purpose of habitually committing dacoity[2], shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Punishment for belonging to gang of dacoits

COMMENT.

Object.—This section was intended by the Legislature to provide for the punishment of those who belong to a gang of persons who make it their business to commit dacoity; and it is not essential for the purpose of conviction that the [illegible] business is the habitual commission of dacoity, or, in orther words, that he was associated with others for the habitual pursuit of that offence[1]. It is not necessary that the person belonging to a gang must have taken part in any one dacoity But actual participation by that person in any given dacoity is sufficient evidence both of his association with the gang and of his object in such association.

Association for the habitual pursuit of dacoity is the gist of the offence under this section[2]. A conviction can be had even where no actual commission of a dacoity is proved[3]. The offence is of a very special character.

1. 'Belong'.—The word 'belong' implies something more than the idea of casual association; it involves the notion of continuity and indicates a more or less intimate connection with a body of persons extending over a period of time sufficiently long to warrant the inference that the person affected has identified himself with a band, the common purpose of which is the habitual commission of dacoity[4]. Where at the trial of a gang of habitual dacoits who were charged with the commission of ten dacoities, the evidence against an individual was no more [illegible]

this section, unless it be proved that the women themselves were associated with the husbands or protectors for the purpose of themselves habitually committing [illegible]

Generally speaking, only those persons can be convicted under this section, who

Kure, (1886) 6 A. W. N. 65, 66; *Kader Sundar*, (1911) 16 C. W. N. 60; *Murli Brahman*, (1924) 27 O. C 385.

[2] *Kader Sundar*, sup.

[3] *Murli Brahman*, sup.; *Suresh Chandra Banerjee*, (1927) 47 C. L. J. 471.

[4] *Hira Lal*, (1910) 13 O. C. 243; *Bhabuti*, (1921) 19 A. L. J. 725; *Suresh Chandra Banerjee*, sup.

[5] *Bhabuti*, *ibid.*

[6] *Yelli kom Yella*, (1896) Cr. R. No. 26 of 1896, Unrep. Cr. C. 863.

[7] *Gaya Din*, (1908) 13 O. C. 235.

have either taken active part in the crime or been employed for the purpose of scouting or in other ways facilitating the commission of the crime[1].

2. 'Associated for the purpose of habitually committing dacoity'.— The word 'habitual' means constant[2]. The element of the offence under this section is association with the knowledge that the gang is formed for the purpose of committing dacoities habitually and conviction can be had under this section even where no actual commission of dacoity by a particular accused person is proved[3].

PRACTICE.

Evidence.— Prove (1) that the accused belonged to the gang in question.

(2) That such gang was associated for the purpose of habitually committing dacoity[4].

One of the chief points to establish in a case of gang dacoity is association in the crime, and if it can be proved that certain persons have joined together to commit burglaries as well as dacoities, the former fact is strong evidence of criminal association and is relevant to show that they are members of the gang. If a gang can be shown to have been associated for the habitual commission of dacoities, evidence as to other crimes committed by the gang, e.g., burglaries, may very well be relevant against the accused[5].

The associating and the purpose of the association may be proved by direct evidence or by proof of facts from which they can be reasonably inferred. Evidence that the accused or groups of them had been concerned in a large number of dacoities in a comparatively short space of time may be sufficient evidence of such association[6]. It is not sufficient to prove simply that the accused gave shelter and assistance to dacoits[7]. The special conspiracy must be proved[8].

The general criminality of a tribe or caste cannot be imputed to individual members operating in gangs where the prosecution is under this section, and the fact that members of the tribe generally were alleged to have been implicated in several dacoities within a period of ten years preceding the trial was not sufficient proof against the persons under trial when it appeared that the tribe contained within it thousands of human beings[9].

Where association for the purpose of habitually committing dacoity had not been made out, the mere fact that some of the accused had been previously convicted of dacoity or theft or had been bound down to be of good behaviour under s. 110 of the Criminal Procedure Code, was of no consequence[10]. The accused were charged, under this section, with belonging to a gang of persons associated for the purpose of habitually committing dacoity. The prosecution sought to prove against some of the accused that they had been previously convicted of theft or had been ordered to give security for good behaviour on the ground of being habitual thieves. It was held that evidence regarding previous conviction or bad livelihood was not admissible under s. 14 of the Evidence Act, because the offence for which the accused were being tried was the particular one of belonging to a gang of dacoits and simple theft or bad livelihood, in which the order for giving security was based on evidence that the accused habitually committed thefts, was not evidence indicating an intention to commit the particular crime of which the accused were charged[11].

[1] *Nidhi*, (1924) 1 O. W. N. 660.
[2] See *Baburam Kansari*, (1891) 19 Cal. 190.
[3] *Murli Brahman*, (1924) 26 Cr. L. J. 1412, 27 O. C. 385.
[4] *Naba Kumar Putnaik*, (1897) 1 C. W. N. 146; *Walia*, (1910) P. L. R. No. 18 of 1910; *Mooktaram Sirdar*, (1875) 23 W. R. (Cr.) 18; *Kure*, (1886) 6 A. W. N. 65.
[5] *Nidhi*, sup.
[6] *Bonigiri Polligadu*, (1908) 32 Mad. 179.
[7] *Vithu Rayaji*, (1899) 1 Bom. L. R. 156.
[8] *Tirumal Reddi*, (1901) 24 Mad. 523, 546.
[9] *Kader Sundar*, (1911) 16 C. W. N. 69.
[10] *Ibid.*
[11] *Haji Sher Mahomed*, (1921) 25 Bom. L. R. 214, 7 Bom. Cr. C. 48.

But where there is sufficient evidence to establish association for the purpose of habitually committing theft, evidence of previous convictions of offences against property and of bad livelihood is admissible to prove habit, and for this purpose, convictions of bad livelihood are more cogent than those of isolated thefts[1]. Evidence that the accused were bound down under s. 110 of the Code of Criminal Procedure is admissible[2].

Previous conviction of the accused for dacoity along with other dacoities

offence under this section had once been sent hey were acquitted could not be relied on to No adverse inference can be drawn against accused persons after their acquittal[4].

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, belonged to a gang of persons associated for the purpose of habitually committing dacoity, and thereby committed an offence punishable under s. 400 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—"There are...many points which have to be considered. . in determining what is an adequate sentence to pass upon an accused convicted of an offence f the following:—

(1)

(2) ang since the accused joined it ?

(3) In how many of these dacoities did the accused actually take part? (If the accused are being separately prosecuted for every dacoity in which they have been concerned as members of the gang, this point must be left out of consideration).

(4) What was the character of the dacoities in which the accused actually took part? Were they accompanied with murder, culpable homicide, grievous hurt, torture, or with any acts of a specially brutal character, or were they only dacoities of the ordinary character"?[5]

In the case of a gang consisting of desperate men prepared to proceed to all lengths in carrying out their crimes, the heaviest possible sentences should whether ommitted in a recognized gang[6]

Separate sentences can be passed on an accused person, who has been proved to have taken part in a particular dacoity and also to have been a member of a gang of dacoits The limit of punishment prescribed by s. 71 does not apply to such a case. The provisions of s. 397 of the Code of Criminal Procedure will apply to such a case and then it will be at the discretion of the criminal Court whether the two sentences should run concurrently or not[7].

[1] *Bhona*, (1911) 38 Cal. 408; *Ledu Molla*, (1925) 52 Cal. 595.

[2] *Ledu Molla*, *ibid*

[3] *Walia*, (1910) P. L. R. No. 18 of 1910.

[4] *Kader Sundar*, (1911) 16 C. W. N. 69.

[5] Per Ward, J. C., in *Nga Lu Nge Gyi*, (1889) S. J. L. B 441, 442.

[6] *Ghulam Mustafa*, (1911) P. W. R. (Cr.) No. 45 of 1911, P. L. R. No. 68 of 1911.

[7] *Murli Brahman*, (1924) 27 O. C. 385.

have either taken active part in the crime or been employed for the purpose of scouting or in other ways facilitating the commission of the crime[1].

2. 'Associated for the purpose of habitually committing dacoity'.—The word 'habitual' means constant[2]. The element of the offence under this section is association with the knowledge that the gang is formed for the purpose of committing dacoities habitually and conviction can be had under this section even where no actual commission of dacoity by a particular accused person is proved[3].

PRACTICE.

Evidence.—Prove (1) that the accused belonged to the gang in question.

(2) That such gang was associated for the purpose of habitually committing dacoity[4].

One of the chief points to establish in a case of gang dacoity is association in the crime, and if it can be proved that certain persons have joined together to commit burglaries as well as dacoities, the former fact is strong evidence of criminal association and is relevant to show that they are members of the gang. If a gang can be shown to have been associated for the habitual commission of dacoities, evidence as to other crimes committed by the gang, e.g., burglaries, may very well be relevant against the accused[5].

The associating and the purpose of the association may be proved by direct evidence or by proof of facts from which they can be reasonably inferred. Evidence that the accused or groups of them had been concerned in a large number of dacoities in a comparatively short space of time may be sufficient evidence of such association[6]. It is not sufficient to prove simply that the accused gave shelter and assistance to dacoits[7]. The special conspiracy must be proved[8].

The general criminality of a tribe or caste cannot be imputed to individual members operating in gangs where the prosecution is under this section, and the fact that members of the tribe generally were alleged to have been implicated in several dacoities within a period of ten years preceding the trial was not sufficient proof against the persons under trial when it appeared that the tribe contained within it thousands of human beings[9].

Where association for the purpose of habitually committing dacoity had not been made out, the mere fact that some of the accused had been previously convicted of dacoity or theft or had been bound down to be of good behaviour under s. 110 of the Criminal Procedure Code, was of no consequence[10]. The accused were charged, under this section, with belonging to a gang of persons associated for the purpose of habitually committing dacoity. The prosecution sought to prove against some of the accused that they had been previously convicted of theft or had been ordered to give security for good behaviour on the ground of being habitual thieves. It was held that evidence regarding previous conviction or bad livelihood was not admissible under s. 14 of the Evidence Act, because the offence for which the accused were being tried was the particular one of belonging to a gang of dacoits and simple theft or bad livelihood, in which the order for giving security was based on evidence that the accused habitually committed thefts, was not evidence indicating an intention to commit the particular crime of which the accused were charged[11].

1 *Nidhi,* (1924) 1 O. W. N. 660.
2 See *Baburam Kansari,* (1891) 19 Cal. 190.
3 *Murli Brahman,* (1924) 26 Cr. L. J. 1412, 27 O. C. 385.
4 *Naba Kumar Putnaik,* (1897) 1 C. W. N. 146; *Walia,* (1910) P. L. R. No. 18 of 1910; *Mooktaram Sirdar,* (1875) 23 W. R. (Cr.) 18; *Kure,* (1886) 6 A. W. N. 65.
5 *Nidhi,* sup.
6 *Bonigiri Pottigadu,* (1908) 32 Mad. 179.
7 *Vithu Rayaji,* (1899) 1 Bom. L. R. 156.
8 *Tirumal Reddi,* (1901) 24 Mad. 523, 546.
9 *Kader Sundar,* (1911) 16 C. W. N. 69.
10 *Ibid.*
11 *Haji Sher Mahomed,* (1921) 25 Bom. L. R. 214, 7 Bom. Cr. C. 48.

But where there is sufficient evidence to establish association for the purpose of habitually committing theft, evidence of previous convictions of offences against property and of bad livelihood is admissible to prove habit, and for this purpose, convictions of bad livelihood are more cogent than those of isolated thefts[1]. Evidence that the accused were bound down under s. 110 of the Code of Criminal Procedure is admissible[2].

Previous conviction of the accused for dacoity along with other dacoities

of the persons undergoing trial for an offence under this section had once been sent up on a charge of dacoity of which they were acquitted could not be relied on to prove that they were habitual dacoits No adverse inference can be drawn against accused persons after their acquittal[4].

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, belonged to a gang of persons associated for the purpose of habitually committing dacoity, and thereby committed an offence punishable under s. 400 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge

Punishment.—"There are...many points which have to be considered. . in determining what is an adequate sentence to pass upon an accused convicted of an offence falling under s. 400 ..Among these may be noted the following.—

(1) How long has the accused belonged to the gang ?

(2) What dacoities have been committed by the gang since the accused joined it ?

(3) In how many of these dacoities did the accused actually take part ? (If the accused are being separately prosecuted for every dacoity in which they have been concerned as members of the gang, this point must be left out of consideration).

(4) What was the character of the dacoities in which the accused actually took part ? Were they accompanied with murder, culpable homicide, grievous hurt, torture, or with any acts of a specially brutal character, or were they only dacoities of the ordinary character" ?[5]

In the case of a gang consisting of desperate men prepared to proceed to all lengths in carrying out their crimes, the heaviest possible sentences should [illegible] whether [illegible] ommitted [illegible] in a recognized gang[6].

Separate sentences can be passed on an accused person, who has been proved [illegible] ave been a member of a [illegible] s. 71 does not apply to [illegible] minal Procedure will apply to such a case and then it will be at the discretion of the criminal Court whether the two sentences should run concurrently or not[7].

[1] *Bhona*, (1911) 38 Cal. 408; *Ledu Molla*, (1923) 52 Cal. 595.
[2] *Ledu Molla*, *ibid*
[3] *Walia*, (1910) P. L. R. No 18 of 1910.
[4] *Kaler Sundar*, (1911) 16 C. W. N. 69.
[5] Per Ward, J. C., in *Nga Lu Nge Gyi*, (1889) S. J. L. B 441, 442.
[6] *Ghulam Mustafa*, (1911) P. W. R. (Cr.) No. 45 of 1911, P. L. R. No. 68 of 1911.
[7] *Murli Brahman*, (1924) 27 O. C. 385.

As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 11 (*d*) and 12 (2). As to Burma, see the Burma Laws Act, 1898, s. 4 (3) (*b*) and Sch. II.

Punishment for belonging to gang of thieves.

401. Whoever, at any time after the passing of this Act, shall belong to any wandering or other gang of persons[1] associated for the purpose of habitually[2] committing theft or robbery, and not being a gang of thugs, or dacoits, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

The principle enunciated in the last section is extended by this section to a gang of thieves or robbers. The gist of an offence under this section is association for the purpose of habitually committing theft or robbery.

The 'association' referred to in the section must be a conscious association with the primary object of committing the offences mentioned therein[1].

Scope.—This section "no doubt has excellent objects and uses; but it ought not to be resorted to when the persons sought to be brought within its four corners, might have been made responsible for distinct and individual offences: nor is it intended to affect them, unless an association for the habitual commission of theft or robbery is clearly made out"[2].

1. **'Belong to any wandering or other gang of persons'.**—The word "belong" is very comprehensive, but the expression "to belong to a gang of persons, etc." conveys the same idea as "to be one of a gang of persons, etc." "Gang" is derived from the Anglo-Saxon word "gangan" to go, and its dictionary meaning is "a number going in company, hence a company or number of persons associated for a particular purpose". If it could be said that a person belongs to a gang of persons associated for the purpose of habitually committing theft because he receives stolen property from them, then this section would apply to all who may in some way or other be connected with the gang, for instance, the wives and children of the men constituting the gang, and persons who may give them shelter or provide food for them. The object of the section obviously is to punish the persons who organize thieving expeditions and form a party to commit theft. A person who receives stolen property from them, for instance, a *saraf* (merchant) cannot be said to belong to their gang. The habitual receiver of stolen property is punishable under s. 413 and not under this section[3].

2. **'Habitually'.**—Habit is to be proved by the aggregate of acts, and though the charge is a charge of a single offence, the period over which the association extends is often very long; and the longer the period the better it is to establish habit[4]. It is not necessary to prove that each individual member of the gang has habitually committed theft or any particular act of theft. Once it is proved that a gang was formed for the purpose of habitually committing theft, all persons who thereafter join the gang in committing one more theft come within the purview of this section[5].

CASES.

Where it was proved that certain persons were found together at some distance from their houses, that they were all intimately connected with one another and were in the habit of visiting *melas* (assemblies) together, that one of them was arrested in

1 *Ajita*, (1912) 9 A. L. J. 565.

2 Per Straight, J., in *Jahangira*, (1886) 6 A. W. N. 16.

3 *Abdulla*, (1926) 28 P. L. R. 19.

4 *Kasem Ali*, (1919) 47 Cal. 154, 159.

5 *Darya Singh*, (1923) 25 Cr. L. J. 520.

the act of picking a pocket, and that when they were arrested many of them gave false names and false addresses, it was held that they could not be convicted under this section, there being no proof that they belonged to a gang of persons associated for the pur[illegible] In a trial on a charge of belonging to a gang [illegible] evidence a[illegible] on a [illegible] where [illegible] that [illegible] at the above circumstances were not sufficient proof of the association and of the association being for the habitual committing of theft which are required to be established to support a charge under this section[2]

PRACTICE.

Evidence.—Prove (1) that there existed a gang of persons.

(2) That those persons were associated for the purpose of committing theft or robbery.

(3) That theft or robbery was to be committed habitually[3].

(4) That the accused was a member of such gang

Aggregate of acts will prove the habit[4] It is not necessary to prove that each individual member of the gang has habitually committed theft or has committed any particular theft in company with other members Once it is proved that a gang, however small, was formed for the purpose of habitually committing theft, all persons who thereafter joined that gang in committing one or more thefts, come within the purview of this section[5] Any person who knowing of the existence of such a gang joins that gang for the purpose of committing even one theft is guilty under this section. At the same time a person may have taken part in a [illegible] member of [illegible] n any given [illegible] his object [illegible] our persons, [illegible] to a gang of dacoits, [illegible] together at different places, before and after the commission of thefts and burglaries in bazaars, boats and houses, of being seen on various occasions carrying away stolen articles or found in company under circumstances suggesting complicity in thefts and burglaries, and evidence of systematic thefts of cattle by individual accused are held sufficient to support a conviction under this section[9].

The possession of stolen property by the gang, and the fact that the country through which the gang passed was free from petty crimes when they were not about, are admissible facts[10]. Similarly, evidence of previous convictions of some of the accused for theft, house-breaking, receiving or concealing stolen property both prior and subsequent to the year when the gang was found to have been first formed, is admissible[11].

1 *Mankura Pasi*, (1899) 27 Cal. 139.
2 *Subban*, (1891) 1 Weir 452.
3 *Shriram Venkatasami*, (1871) 6 M. H. C. 120; *Mankura Pasi*, sup; *Naba Kumar Patnaik*, (1897) 1 C. W. N. 146; *Dwarka* [illegible]
5 *Beja*, (1913) P. R. No. 13 of 1914.
6 *Wasawa Singh*, (1916) P. L. R. No. 110 of 1916.
7 *Lale*, (1929) 6 O. W. N. 441.
[illegible]

Evidence of character of the accused.—The character of the accused not being a fact in issue in the offence of belonging to a gang of persons associated for the purpose of habitually committing theft, evidence of bad character or reputation of the accused is inadmissible[1]. This case has been doubted in a subsequent case in which it is held that where other evidence establishes association for the purpose of habitually committing theft, evidence of previous convictions of offences against property and of bad livelihood is admissible to prove habit; and for this purpose convictions of bad livelihood are more cogent than those of isolated thefts[2]. For the purpose of determining whether a party of accused persons constituted a gang of persons associated for the purpose of habitual theft, the evidence that each individual of that party is a convicted thief is relevant. Such evidence can be tendered before or after the prosecution have established the association[3]. At the trial of an accused in 1922 for the offence of belonging to a gang of thieves, a former judgment convicting him of dacoity in 1907 was held admissible in evidence. The former judgment is, however, only useful for showing that the accused is a person of criminal tendencies to theft who may be a member of the alleged gang. It by no means goes to show that he had any habit of committing thefts in the period under consideration[4].

Procedure.—*Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.*

Charge to jury.—The Judge should put clearly to the jury—(1) the necessity of proof of association; and (2) the need of proving that that association was for the purpose of habitual theft, and that habit is to be proved by an aggregate of acts[5].

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, belonged to a (wandering) gang of persons associated for the purpose of habitually committing theft (*or* robbery), and that you thereby committed an offence punishable under s. 401 of the Indian Penal Code, and within my cognizance [or the cognizance of the Court of Session (or High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation III of 1901), ss. 11 (3) (d) and 12 (2). As to Burma, see the Burma Laws Act 1898), s. 4 (3) (*b*) and Sch. II.

"If an accused takes part in any dacoity accompanied with murder, the proper section of the Penal Code to apply to him is s. 396 in addition to s. 400, and he is liable to be sentenced to death, or transportation for life, or ten years' rigorous imprisonment and fine. If he has not rendered himself liable to this extent, a distinction must still be made between those dacoits who, though belonging to an organized band, have only recently joined it, and have perhaps not taken part in more than one or two dacoities at the utmost, and those who have belonged to a gang for years and have taken part in many dacoities; between those who have belonged to the worst gangs, who go about armed defying the authorities and inflicting grievous hurt upon the people, and those smaller and less dangerous gangs who dacoit only because driven to do so by want and starvation, and because they are afraid to surrender, and who inflict no injury upon the people beyond that

1 *Mochura Pasi*, (1899) 27 Cal. 133.
2 *Bhona*, (1911) 38 Cal. 408.
3 *Tukaram Malhari*, (1912) 14 Bom. L. R. 373, 1 Bom. Cr. C. 138.
4 *Motiram Hari*, (1924) 26 Bom. L. R. 1223, 7 Bom. Cr. C. 230.
5 *Shriram Venkatasami*, (1871) 6 M. H. C. 120.

of depriving them of a few fowls and baskets of paddy, the food they are in search of"[1].

402. Whoever, at any time after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Assembling for purpose of committing dacoity.

COMMENT.

This section applies to mere assembling without proof of other preparation. Where there is preparation s. 399 applies[2]

Five or more persons (who constitute an unlawful assembly) meeting for a common purpose to commit dacoity are subject to the severe punishment provided in this section, even though the persons assembled may not have preceded one step towards the accomplishment of their object

CASES.

Where the accused knew that the assembly, of which they formed a part, was an assembly for the purpose of committing dacoity, and that all the persons of the assembly lived on the proceeds of dacoity and had no other means of living, they were guilty of this offence[3] Several persons were found at eleven o'clock at night on a road just outside the city of Agra, all carrying arms (guns and swords) concealed under their clothes. None of them had a license to carry

[illegible]

bands just outside the village. Subsequently, different members of these three bands were caught and found to be in possession of arms and ammunition, and none of them could explain his presence at the spot It was held that they were members of a party and had collected for the purpose of committing dacoity and were consequently liable to be convicted under this section[5]. Where the accused belonging to different villages were found at a lonely well at a long distance from their homes fully armed and equipped for committing a dacoity, a conviction under this section was held maintainable[6].

PRACTICE.

Evidence.—Prove (1) that five or more persons were assembled.

(2) That they were assembled for the purpose of committing dacoity.

(3) That the accused was one of such persons.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

[1] Per Ward, J. C., in *Nga Lu Nge Gyi*, (1899) S. J. L. B. 441, 442.

[2] *Ramesh Chandra Banerjee*, (1913) 41 Cal. 350.

[3] [illegible]

... object of the accused to commit dacoity and not any other offence. It has been referred to with approval in *Bhola*, (1924) 22 A. L. J. 1028.

[4] *Bhola*, ibid.

[5] *Waryam Singh*, (1926) 27 Cr. L. J. 605; *Ahmad*, (1927) 29 Cr. L. J. 14.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, were one of five (*or* more) persons assembled for the purpose of committing dacoity, and that you thereby committed an offence punishable under s. 402 of the Indian Penal Code and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 11 (3) (*d*) and 12 (2). As to Burma, see the Burma Laws Act (1898), s. 4 (3) (*b*).

Of Criminal Misappropriation of Property.

Dishonest misappropriation of property.

403. Whoever dishonestly misappropriates or converts to his own use[1] any moveable property[2], shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

ILLUSTRATIONS.

(*a*) A takes property belonging to Z out of Z's possession, in good faith, believing, at the time when he takes it, that the property belongs to himself. A is not guilty of theft; but if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(*b*) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.

(*c*) A and B being joint owners of a horse, A takes the horse out of B's possession, intending to use it. Here, as A has a right to use the horse, he does not dishonestly misappropriate it. But, if A sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

Explanation 1.—A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

ILLUSTRATION.

A finds a Government promissory note beglonging to Z, bearing a blank endorsement. A, knowing that the note belongs to Z, pledges it with a banker as a security for a loan, intending at a future time to restore it to Z. A has committed an offence under this section.

Explanation 2.—A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it: it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believes that the real owner cannot be found.

ILLUSTRATIONS.

(*a*) A finds a rupee on the high road, not knowing to whom the rupee belongs, A picks up the rupee. Here A has not committed the offence defined in this section.

(*b*) A finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs He appropriates the note. He is guilty of an offence under this section.

(*c*) A finds a cheque payable to bearer He can form no conjecture as to the person who has lost the cheque. But the name of the person who has drawn the cheque appears A knows that this person can direct him to the person in whose favour the cheque was drawn. A appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section

(*d*) A sees Z drop his purse with money in it. A picks up the purse with the intention of restoring it to Z, but afterwards appropriates it to his own use. A has committed an offence under this section

[illegible] belongs; he after- [illegible] A is guilty [illegible]

(*f*) A finds a valuable ring, not knowing to whom it belongs A sells it immediately without attempting to discover the owner. A is guilty of an offence under this section.

COMMENT.

Criminal misappropriation takes place when the possession has been innocently come by, but where, by a subsequent change of intention, or from the knowledge of some new fact with which the party was not previously acquainted, the retaining becomes wrongful and fraudulent[1]. The offence consists in the dis- [illegible] time, of property [illegible] [illegible]der[2]. See illus- [illegible] [illegible]aking amounts to criminal misappropriation by subsequent acts.

This section lays down a principle quite at variance with the English law according to which the intention of the accused at the time of obtaining the possession of property is only taken into account. If the intention was not dishonest when the possession was obtained, subsequent change of intention does not convert the possession into an illegal one. Explanation 2 emphasizes the difference between the English law and the Code.

"Section 403 requires that the property should be shown to have been misappropriated or converted to his own use by the accused. The mere possession of the property is not sufficient for proving the charge without something to in- [illegible] [illegible]ttempt [illegible] proof [illegible] [illegible]e, nor

[1] Per Norris and Ghose, JJ., in *Bhyjiram Dome* v. *Abar Dome*, (1888) 15 Cal. 358, 400.

[2] *Ramakrishna*, (1888) 12 Mad. 49, 50

did any interval of time worth considering elapse between the taking and the arrest to raise any presumption, from the mere act of detention, of an intention to misappropriate or convert. Explanation (2) to s. 403...makes the necessity of some positive proof of this sort quite clear. Illustration (*a*) shows that the picking up of a rupee, whose owner is not known, is not an offence. Similarly, illustration (*e*) shows that the finding of a purse with money belonging to an unknown owner is not an offence, but the appropriation of it to the finder's own use is necessary to complete it"[1].

According to the English law innocent taking followed by conversion, owing to subsequent change of intention, is a civil wrong but not an offence.

Theft and criminal misappropriation.—In theft the object of the offender always is to take property which is in the possession of a person out of that person's possession; and the offence is complete as soon as the offender has moved the property in order to a dishonest taking of it. In criminal misappropriation, there is not necessarily an invasion of the possession of another person by an attempt to take from him that which he possesses. The offender is already in possession of the property; and is either lawfully in possession of it, because either he has found it or is a just owner of it, or his possession, if not strictly lawful, is not punishable as an offence because he has acquired it under some mistaken notion of right in himself or of consent given by another.

Ingredients.—The section requires—

1. Dishonest misappropriation or conversion of property for a person's own use.
2. Such property must be moveable.

1. 'Dishonestly misappropriates or converts to his own use'.—"In order to be dishonest the property must be misappropriated or converted 'with the intention of causing wrongful gain to one person, or wrongful loss to another', that is, with the intention to cause gain by unlawful means of property to which the person gaining it is not legally entitled, or the loss by unlawful means of property to which the person losing it is legally entitled. The gain or loss of property, and the gain or loss of the possession of property are not necessarily identical things, and the distinction is especially clear when the loss of possession is only temporary, and is intended by the person who causes such loss to be temporary only. When there is no intention to cause wrongful gain or wrongful loss of property, and merely an intention to deprive the owner temporarily of the use of property, dishonesty is not made out"[2]. The offence is complete if the conversion is done with the intention of causing wrongful gain to the offender irrespective of any loss which may ensue to any other person. The offence does not depend on the consequence which has ensued, but only on the act which has been done[3]. A wrong opinion that the accused was justified in keeping the thing does not constitute this offence[4].

'Dishonestly misappropriates'.—The verb 'to appropriate' in this connection means setting apart for, or assigning to, a particular person or use; and to 'misappropriate' means to set apart for or assign to the wrong person or a wrong use, and this act must be done dishonestly[5]. The word 'misappropriation' is in the illustrations and in the explanations to the section replaced by the expression "appropriates to his own use", which seems equivalent to setting apart for his own use to the exclusion of others". It does not, of course, follow from this that setting apart by one person for the use of some person other than himself and the

[1] Per Chatterji, J., in *Phuman*, (1907) P. R. No. 11 of 1908, p. 33.

[2] Per Plowden, J., in *Jhandu*, (1886) P. R. No. 27 of 1886.

[3] *Simhachalam* v. *Rati Kanta Laha*, (1917) 21 C. W. N. 573; *Ahmed Ebrahim* v. *Ganny*, (1923) 24 Cr. L. J. 746.

[4] *Khanderao*, (1894) Cr. R. No. 30 of 1894, Unrep. Cr. C. 700.

[5] *Sohan Lal*, (1915) 13 A. L. J. 1131.

true owner, is not a misappropriation. A Hindu girl having picked up a gold necklet and made it over to a sweeper girl, the accused, the brother of the finder, represented to the latter that the necklet belonged to a person of his acquaintance and thus got possession of it from her. On enquiry by a police constable a few hours later, he repeated the representations, but afterwards gave up the necklet. These representations were found to be untrue to the knowledge of the accused. It was held that he had committed this offence[1]. This section is in no way restricted to appropriating property to one's own use If a trustee repudiates the trust and asserts that he holds the property on behalf of a person other than the one who entrusted him with it, he has misappropriated the property just as much as he would have been said to misappropriate it if he had been putting forward his own claims to it[2].

A false denial of a loan is not in itself a misappropriation at all, and may amount to no more than an attempt to evade civil liability for the money or the chattel lent Attempt to evade civil liability does not necessarily imply that the property lent has been misappropriated. The false denial of a loan is compatible with the absence of criminal misappropriation, and no more constitutes that offence than possession of stolen property constitutes theft or dishonest receipt. The false denial may be evidence of an offence under this section as possession of stolen property may be evidence of offences under s. 379 or s. 411[3].

'Converts to his own use'.—There must be actual conversion of the thing appropriated to the use of some person other than the person entitled thereto Where the accused found a thing, and merely retained it in his possession, it was held that he could not be convicted of criminal misappropriation[4] Similarly, where the accused found a purse on the pavement of a temple in a crowded gathering and put it in his pocket but was immediately after arrested, it was held that he was not guilty of criminal misappropriation for it could not be assumed that by the mere act of picking up the purse or putting it in his pocket he intended to appropriate its contents to his own use[5] Where a police constable of seventeen years' standing caught a strayed sheep intended for sacrifice and on his transfer, from the *thana* to which he was attached, to another *thana* he took it with him there, it was held that it was sufficient evidence of dishonesty[6].

2. **'Any moveable property'.**—The misappropriation must be of 'moveable property'. As to the meaning of this expression, see s 22, *supra*

There cannot be any criminal misappropriation with regard to immoveable property. [illegible] roperty' [illegible] owner [illegible] freedom [illegible] ial misappropriation. The fact that such a bull receives some attention from the cowherd of the persons who set it at liberty and is daily fed by him by direction of his employers, and is not used for breeding purposes without their permission being asked, is not consistent with a total surrender by those who set it at liberty of all their rights as proprietors[8].

[illegible] ted, either permanently [illegible] the possession of the [illegible] rty of another is common to theft and to criminal misappropriation. But this intention, which in theft

1 *Jhandu*, (1886) P. R. No 27 of 1886.
2 *Indar Singh*, (1925) 48 All. 288.
3 *Girji*, (1904) 6 Bom. L. R. 1093.
4 *Abdool*, (1868) 10 W. R. (Cr) 23-A.
5 *Phuman*, (1907) P. R. No. 11 of 1908.
6 *Sarju Malla*, (1918) 17 A. L. J. 145, 1 U. P. L. R. 88.
7 *Bandhu*, (1885) 8 All. 51; *Nihal*, (1887) 9 All. 348.
8 *Romesh Chunder Sannyal* v. *Hiru Mondal*, (1890) 17 Cal. 852.

is sufficiently manifested by a moving of the property, must in the other offence be carried into action by an actual misappropriation or conversion[1].

Temple property.—The property of an idol or a temple must be used for the purposes of that idol or temple: any other use will be a malversation of that property, and, if dishonest, will amount to criminal misappropriation[2].

Retention of money paid by mistake.—Where money is paid to a person by mistake, and such person, either at the time of receipt or at any time subsequently, discovers the mistake, and determines to appropriate the money, that person is guilty of criminal misappropriation[3]. In England, the law is doubtful on this point[4].

Joint property.—Where the accused is interested in the property jointly with others, he is not necessarily guilty of a criminal act if he takes possession of it, and disposes of it[5]. But joint property might be criminally misappropriated[6]. No co-parcener in a joint Hindu family having before division a right in or to any specified share in any particular items of the family property, a prosecution for dishonest misappropriation cannot lie against the managing member of the family until the accounts have been taken and the shares allotted[7]. "Such managing member may be liable to a charge of misappropriation, if, after a division of property has taken place, and the share of each member of the family has been ascertained, it is found that the manager has wrongfully applied to his own use the share that belongs to one of the other co-parceners; but so long as no account of produce or money has been taken, or the shares ascertained, no member of an undivided Hindu family has the right to claim any particular share or property as his separate property, and no prosecution against the manager for misappropriation would lie. The mere fact that there has been a general agreement to divide does not entitle one of the co-parceners to claim any defined portion of the estate, nor does it even enable him to say that he is entitled to any particular *quantum* in an isolated item of the property; until division, the law entrusts the property to the manager"[8].

Explanation 1.—"This explanation refers only to cases in which there is a 'dishonest misappropriation', and explains that the section includes temporary as well as permanent misappropriation of that description. It does not extend the section so as to include not only cases of wrongful gain or loss of property, but also cases of wrongful gain or loss of the possession of property, as distinct from gain or loss of the property itself"[9].

A servant, who misappropriates his master's property with the intention of restoring it after a time, ought to be punished. He has no more right to steal his master's property for a time than for ever. It is no answer for a trustee who misappropriates his trust property to say that he intended to put it back again. The fact is that when once a man makes away with property in this way, it generally happens that he never has the means of making restitution. So with regard to the thief, the probability is that when he steals another's property he will never change his mind about restoring the same to the owner[10].

Explanation 2.—There can be no criminal misappropriation of things which have actually been abandoned[11]. The property must have its owner to render a person guilty of misappropriating it.

1 M. & M. 359.
2 *Gadgayya* v. *Guru Siddeshvar*, (1897) Unrep. Cr. C. 919.
3 *Shamsoondur*, (1870) 2 N. W. P. 475.
4 *George Middleton*, (1873) L. R. 2 C. C. R. 38; *Ashwell*, (1885) 16 Q. B. D. 190; *Flowers*, (1886) 16 Q. B. D. 643; *Hehir*, [1895] 2 I. R. 709.
5 *Parbutty Churn Chuckerbutty*, (1870) 14 W. R. (Cr.) 13.
6 *Pania*, (1881) 1 A. W. N. 89.
7 (1880) 1 Weir 453.
8 *Anon*, (1880) 1 Weir 453 (454.)
9 Per Plowden, J., in *Jhandu*, (1886) P. R. No. 27 of 1886.
10 P. L. C. 1861, p. 1270.
11 *Bandhu*, (1885) 8 All. 51; *Nihal*, (1887) 9 All. 348; *Romesh Chunder Sannyal* v. *Hiru Mondal*, (1890) 17 Cal. 852; *Sita*, (1893) 18 Bom. 212.

Where property is cast away or abandoned, any one finding and taking it acquires a right to it which will be good even as against the former owner, if the latter should be minded to resume it, but that, when a thing is accidentally lost, the property is not divested, but remains in the owner who loses it[1].

Property found drifting in a river.—The accused found two logs of wood drifting in a river during a high flood and took possession of them. The logs were left by the accused in front of his house unused and exposed for several months. It was held that a conviction under this section could not be upheld[2].

Lost property.—Where the accused found a gold *mohur* on an open plain, and sold it the next day to a shroff for the full value and appropriated the sale-proceeds, it was held that, in the absence of any information as to the circumstances under which the coin was lost, and as it was not impossible that the property in the coin had been abandoned by the original owner, the accused could not be convicted of criminal misappropriation[3] A person who takes possession of property which the rightful owner has lost is guilty of criminal misappropriation if he appropriates or converts such property to his own use[4]. A person, finding a property of which, from the nature of it, there must be an owner, must take reasonable care of it and *endeavour to find out the owner, but he is not bound to adopt extraordinary means* for the discovery, nor is he bound to be out of pocket in discovering the owner by means of an advertisement[5].

Treasure trove.—A person who found money from a piece of land purchased by him and appropriated it to his own use was held not to have committed this offence[6]

In England the law seems to be this "If a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he take them [illegible] ...e lost, but reasonably

[illegible] does not apply to the [illegible] carriage, and found there by a servant of the company[8].

The possessor of land is generally entitled, as against the finder, to chattels found in the land[9].

CASES.

Dishonest intention necessary.—The accused was found riding on a mare which had strayed away from the possession of its owner. The day after he was found riding he confessed that he had found the mare hobbled, had unfastened the rope and used it as a bridle, had mounted the mare intending to ride her to his house and to loose her when he reached his house. Subsequently he stated before the Magistrate that his intention was to take the strayed mare to a police-station. He was convicted under this section. It was held that the conviction was illegal, for it could not be assumed that the intention of the accused was dishonest. The subsequent statement being attributable to fear did not affect the question of the accused's guilt[10]. The accused, who had lost his buffalo some time back, found a buffalo very much resembling his own entering into his house and tied her in on an open verandah which overlooked a public road and refused to

1 *Glyde*, (1868) L. R 1 C. C R. 139.
2 [illegible] 433
[illegible] *...human*,
[illegible]
[illegible] 261.
[illegible] 491.

7 Per Park, B, in *Thurborn*, (1849) 18 L. J. M. C. (N. S.) 140, 141.
8 *Pierce*, (1852) 6 Cox 117.
9 *South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q. B 44.
10 *Muhammads*, (1905) P. L. R. No. 23 of 1906.

permit the complainant, who claimed the buffalo as his, to remove the same. It was held that the essential element of a dishonest intention to make up the offence was wanting[1]. Where the accused removed posts and shutters for firewood from a house which they believed was deserted, it was held that they did not commit criminal misappropriation for there was no dishonesty in the act[2]. Where the accused took certain hides from the prosecutrix, but refused to pay for them on the ground that she owed a sum to him, it was held that he had not committed this offence[3]. Where a Sub-Inspector of Police kept a bullock for twenty days and after advertising for the owner sold it, it was held that no offence had been made out under this section[4].

Claim of right.—A servant, who retained in his hands money which he was authorised to collect and which he did collect from the debtor of his master, because money was due to him as wages, was held guilty of criminal misappropriation[5].

Servant misappropriating money received on behalf of his master.—Where the accused, a Government servant, whose duty it was to receive certain monies and to pay them into the treasury on receipt, admitted that he had retained two sums of money in his possession for several months, but on fearing detection he paid them into the treasury, making a false entry at the time in his books with a view to avert suspicion[6]; and where the accused, a village *karnam*, received money from the head of the village for the purpose of remitting it to the public treasury, but omitted to do so until after an inquiry had been held into arrears due by the villagers[7] it was held that this offence was committed.

Secreting letters.—The accused, a servant in the Postal Department, while assisting in the sorting of letters, secreted two letters, with the intention of handing them over to the delivery peon and sharing with him certain money payable upon them. It was held that the accused was guilty of attempt to commit dishonest misappropriation of property and of theft[8].

A letter addressed to W was handed by a postman to W, who was at the time in a room in the occupation of H. W read the letter, and put it on a table in the room and left it there. H took the letter, and subsequently attempted to file it as an exhibit attached to an affidavit made by him in a suit for judicial separation between W and his wife, for the purpose, as he afterwards stated, of strengthening Mrs. W's case and of improving his own position". The Court, however, refused to receive the letter. It was held that in the circumstances H could not be convicted of dishonest misappropriation of property with respect to his retention of the letter[9].

Harvesting crops under an attachment.—A judgment-debtor, whose standing crops were attached, harvested them while the attachment was in force. It was held that he had committed this offence[10].

Exchanging of railway tickets.—A and B were about to travel by the same train from Benares City. A had a ticket for Ajudhia. B had two tickets for Benares Cantonment. A voluntarily handed over her ticket to B in order that he might tell her if it was right. B, under the pretence of returning A's ticket, substituted therefor one of his own, and kept A's ticket. It was held that the offence committed by B was that of criminal misappropriation rather than that of cheating[11].

1 *Dwarka Doss* v. *Narasimhalu Naidu*, (1922) 44 M. L. J. 128.
2 *Nawtara Singh*, (1904) 10 Burma L. R. 356.
3 *Boystum Moochee*, (1872) 17 W. R. (Cr.) 11.
4 *Amir Hasan Khan*, (1925) 24 A. L. J. 128.
5 *Bissessur Roy*, (1869) 11 W. R. (Cr.) 51.
6 *Ramakrishna*, (1888) 12 Mad. 49; *Kareem Bux*, (1871) 3 N. W. P. 30.
7 *Madduri Krishnamma*, (1884) 1 Weir 455.
8 *Venkatasami*, (1890) 14 Mad. 229.
9 *Harris*, (1917) 40 All. 119.
10 *Obayya*, (1898) 22 Mad. 151.
11 *Raza Husain*, (1905) 25 A. W. N. 9.

English cases.—A person purchased, at a public auction, a bureau in which he afterwards discovered, in a secret drawer, a purse containing money, which he appropriated to his own use. At the time of the sale no person knew that the bureau contained anything whatever. It was held that if the buyer had express

the property, and it was no larceny[1]. If a bureau be delivered to a carpenter to repair, and he discovered money in a secret drawer of it, which he, unnecessarily as to its repair, breaks open, and converts the money to his own use, it is a felonious

...hat he did it with intention to restore it to ... stealing banknotes, the property of her ... her defence, that she found them in the passage, and not knowing to whom they belonged, kept them to see if they were advertised. It was held that she ought to have inquired of her master whether they were his notes or not, and that not having done so, but having taken them away from the house, she was guilty of stealing them[3]. The accused stole some iron from a canal, in which it was found when the canal was in process of being cleaned. In an indictment against him for stealing the iron, it was held that the proprietors of the canal had a sufficient property in the iron to justify alleging of the property to be in them[4].

PRACTICE.

Evidence.—Prove (1) that the property in question is moveable property.

(2) That the accused misappropriated it or converted it to his own use

(3) That he did so dishonestly[5].

See the Indian Evidence Act, s. 14, ill. (*b*).

On a charge of criminal misappropriation, it is sufficient for the prosecution to establish that some of the money mentioned in the charge has been misappropriated by the accused, even though it may be uncertain what is the exact amount so misappropriated[6].

When a case comes under the second explanation it should be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases, it would ... examination. It would probably be ... ttel, as an honest man ought to do ... it to the owner the jury might conclude that he took it when he took complete possession of it[7].

The mere fact that the prosecutor gave the accused time to make out his

permission is given by the Court before which the prosecution is pending—Triable by any Magistrate.

[6] *Byramji Chaewalla*, (1927) 52 Bom. 2?0, 30 Bom. L. R. 325, 9 Bom. Cr. C. 206; *Vinayak Bhatkhande*, (1927) 30 Bom. L. R. 1530, 9 Bom. Cr. C. 477.

[7] *Thurborn*, (1849) 18 L. J. M. C. (N.S.) 140, 144

[8] *Sreekant Biswas*, (1866) 5 W. R. (Cr.) 50

In a case of complaint under this section, it is open to a Magistrate in case of doubt to hold an inquiry under s. 202 of the Criminal Procedure Code before summoning the accused in order to find out whether a prima facie case was made out or whether the accused should be summoned or not[1].

Venue.—The offence of criminal misappropriation may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed[2].

Separate offences.—The appropriation of each separate item of money with which a person is entrusted is a separate offence, and the facts connected with it should form the subject of a separate enquiry. The duty of a committing officer in such a case is to select certain distinct items, to frame his charges upon them, and to adduce evidence specially upon those items[3]. Where monies are dishonestly misappropriated and false accounts or vouchers prepared for the purpose of screening the misappropriation, the offence of falsification becomes a part and parcel of the offence of misappropriation, and the whole transaction must be considered practically as one offence consisting of criminal misappropriation[4].

Joinder of charges.—When two persons are implicated in a case of criminal misappropriation with respect to a certain sum of money, the charges against them must be of misappropriation in one case and of abetment in the other because it is impossible to hold that two persons can be guilty of misappropriation of the same sum of money. It is also open to the Court to frame charges against each of them in the alternative, i.e., of misappropriation or of abetment[5].

Charge.—When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of s. 234: Provided that the time included between the first and last of such dates shall not exceed one year[6].

The charge should run as follows:—

I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the ——day of——, at——, dishonestly misappropriated [*or* converted to your own use] certain property, to wit——, belonging to AB, and thereby committed an offence punishable under s. 403 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* High Court)].

And I hereby direct that you be tried [*by* the said Court (*in cases tried by Magistrate omit these words*)] on the said charge[7].

Dishonest misappropriation of property possessed by deceased persons at the time of his death.

404. Whoever dishonestly misappropriates[1] or converts to his own use property[2], knowing that such property was in the possession[3] of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term

1 *Gawkaran Lal* v. *Sarjoo Saw*, (1920) 3 U. P. L. R. (P.) 9.
2 Criminal Procedure Code, s. 181 (2).
3 *Chetter*, (1871) 15 W. R. (Cr.) 5.
Anant Narayan, (1904) 6 Bom. L. R. 94
5 *Girwar Narain*, (1912) 16 C. W. N. 600.
6 Criminal Procedure Code, s. 222 (2).
7 Vide *Parbutty Churn Chuckerbutty*, (1870) 14 W. R. (Cr.) 13.

which may extend to three years, and shall also be liable to fine; and, if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

ILLUSTRATION.

Z dies in possession of furniture and money. His servant A, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. A has committed the offence defined in this section.

COMMENT.

This section relates to a description of property peculiarly needing protection. The offence consists in the pillaging of moveable property during the interval which elapses between the time when the possessor of the property dies, and the time when it comes into the possession of some person or officer authorized to take charge of it[1]

The section is intended only to punish servants and strangers who could possibly have no right to, or interest in, the effects of a dead man and who misappropriated such effects but not to punish near relations who take possecsion of and deal with the deceased's effects under a claim of independent ownership or a claim to succeed as heir to the deceased[3].

1. 'Dishonestly misappropriates'.—A person may commit the offence of [illegible] on at the time [illegible] him although [illegible] f 'dishonestly', see s 24, *supra.*

2. 'Property'.—The High Courts of Bombay and Calcutta have held that the word 'property' does not refer to immoveable property, but only to moveable property. Hence, where a person was convicted of misappropriating the house of a deceased person the conviction was annulled[4]. The Allahabad High Court has dissented from this view. It says that this section contains no such express limitation. This section and some of the other sections following it refer to property without any qualifying description; and in each the context must determine whether the property referred to is intended to be moveable property or property moveable or immoveable. Where the accused, in order to obtain a wrongful gain to the prejudice of a decree holder whose decree was still pending, removed some rafters from a house which was in the possession of a deceased person at the time of her death and had not since been in the possession of any person legally entitled to it, it was held that the accused were guilty of an offence under this section. The property removed by the accused was immoveable property so long as it was attached to the house but became moveable property when it was severed from the house[5]

3. 'Possession'.—See s. 27, *supra.*

PRACTICE.

Evidence.—Under this section all the elements required to constitute the offence of criminal misappropriation in respect of a person who is alive will be necessary[6]. Prove (1) that the property in question is moveable property.

1 [illegible]
2 [illegible]
3 [illegible]
Nob [illegible]
39 [illegible]

4 *Girdhar Dharamdas*, (1869) 6 B. H. C. (Cr. C.) 33; *Jugdown Sinha*, (1895) 23 Cal. 372.
5 *Daud Khan*, (1925) 24 A. L. J. 153.
6 *Nobin Chunder Sircar*, sup.

(2) That it was in the possession of a deceased person at the time of his death.

(3) That it was not thereafter in the possession of any person legally entitled to its possession.

(4) That the accused misappropriated it or converted it to his own use.

(5) That he did so dishonestly[1].

(6) That he knew the circumstances mentioned in (2) and (3)

For the second clause prove further that the accused, was, at the time of the owner's death, employed by him as a clerk or servant.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable[2]—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, dishonestly misappropriated [*or* converted to your own use] certain property, to wit——, knowing that such property was in the possession of AB, a deceased person, at the time of the said AB's decease, and had not since been in the possession of any person legally entitled to such possession: and that you thereby committed an offence punishable under s. 404 of the Indian Penal Code and within my cognizance [*or* within the cognizance of the Court of Session (*or* High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Of Criminal Breach of Trust.

Criminal breach of trust.

405. Whoever, being in any manner entrusted with property, or with any dominion over property[1], dishonestly misappropriates or converts to his own use that property[2], or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do[3], commits "criminal breach of trust".

ILLUSTRATIONS.

(*a*) A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.

(*b*) A is a warehouse-keeper. Z, going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse-room. A dishonestly sells the goods. A has committed criminal breach of trust.

(*c*) A, residing in Calcutta, is agent for Z, residing at Delhi. There is an express or implied contract between A and Z, that all sums remitted by Z to A shall be invested by A according to Z's direction. Z remits a lakh of rupees to A, with direction to A to invest the same in Company's paper. A dishonestly disobeys the directions, and employs the money in his own business. A has committed criminal breach of trust.

[1] *Vide* s. 24, sup. [2] (1874) 7 M. H. C. App. 34.

(e) A, a Revenue-officer, is entrusted with public money, and is either directed by law, or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. A dishonestly appropriates the money. A has committed criminal breach of trust.

(f) A, a carrier, is entrusted by Z with property to be carried by land or water A dishonestly misappropriates the property. A has committed criminal breach of trust.

Punishment for criminal breach of trust.

406. Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

To constitute the offence of criminal breach of trust, there must be dishonest misappropriation by a person in whom confidence is placed as to the custody or management of the property in respect of which the breach of trust is charged[1] The offence of criminal breach of trust closely resembles the offence of embezzlement under the English law.

Scope.—The terms of the section are very wide. It applies to one who is in any manner entrusted with property or dominion over property The section does not require that the trust should be in furtherance of any lawful object. The section then provides, *inter alia*, that if such a person dishonestly misappropriates or converts to his own use the property entrusted to him, he commits criminal breach of trust. This part of the definition is complete in itself. It has no reference to the provisions as to disposal in violation of a direction of law, or of a legal contract. There are separate ways in which criminal breach of trust may be committed[2]. The section embraces the cases of all those offenders not specifically provided for in ss. 407, 408 and 409. Offences committed by trustees with regard to trust property fall within the purview of this section.

Criminal misappropriation and Criminal breach of trust.—In criminal misappropriation the property comes into the possession of the offender by some casualty or otherwise, and he afterwards misappropriates it. In the case of criminal breach of trust the offender is lawfully entrusted with the property and he dishonestly misappropriates the same, or wilfully suffers any other person to do so, instead of discharging the trust attached to it.

Ingredients.—The section requires—

1. Entrusting any person with property or with any dominion over property.

2 The person entrusted (a) dishonestly misappropriating or converting to his own use that property; or (b) dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation—

(i) of any direction of law prescribing the mode in which such trust is to be discharged, or

(ii) of any legal contract made touching the discharge of such trust.

[1] *Issur Chunder Ghose* v. *Peari Mohun Palit*, (1871) 16 W. R. (Cr.) 39; *Ko Set Shwin*, (1903) 10 Burma L. R. 110, (1903) 1 U. B. R. (P. C.) 9.

[2] *Nga Te*, (1904) 2 L. B. R. 216, F.B.

1. **'Entrusted with property, or...dominion over property'.**—It is an essential condition...that the property which is the subject matter of the offence must have been entrusted to a person. "'Entrusted' is not necessarily a term of law. It may have different implications in different contexts. In its most general significance all it imports is a handing over the possession for some purpose which may not imply the conferring of any proprietary right at all"[1]. The word 'entrusted' when used with respect to money means that the money has been transferred to the accused under circumstances which show that notwithstanding its delivery to the accused, the property in it continues to vest in the prosecutor and the money remains in the possession or control of the accused as a bailee and in trust for the prosecutor as bailor, to be restored to him or applied in accordance with his instructions[2]. Where goods are delivered to a person in pursuance of a contract for their purchase, there is no entrustment which would give rise to a trust and the mere fact that the person denies receipt of goods delivered does not render him guilty either of criminal misappropriation or criminal breach of trust[3].

A trust of some kind is necessary.—A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him, for the benefit of another, or of another and the owner[4]. Hence, where there is no original confidence, there is no trust, and a misappropriation, if punishable at all, will be under s. 403.

It is clear that the terms used are wide enough to include trustees of every kind; that is, those who are such, not only by reason of some employment for which they receive remuneration, but by reason of some trust constituted by express deed, or even by mere implication of law, though the office may be gratuitous. It also includes the case of a person who commits this offence by misappropriation of property to the advantage of a third person[5].

the beneficial owner, although in one case, that of the executor, he had the legal title. The property in respect of which criminal breach of trust can be committed must be either the property of some person other than the person accused, or that the beneficial interest in or ownership of it, must be in some other person and the offender must hold such property on trust for such other person or in some way for his benefit[1] Moneys advanced to a broker for the specified purpose of purchase and supply of paddy with the agreement that the broker is to suffer the loss or get the profit by a fall or rise in market price cannot be said to be entrusted to him within the meaning of this section, although by the agreement the company bound itself to take delivery of the paddy purchased and an express trust was declared in regard to the amounts advanced The accused entered into an agreement with the complainant company under which he received Rs 4,500 by way of advance and undertook to employ the money in the purchase and transport of paddy to it There were stipulations in the agreement to the effect that he was to hold the money in trust for the company and that the property in the money and the paddy purchased therewith was to remain with the company These stipulations were, however, inconsistent with other clauses of the agreement which *inter alia* laid on the accused the responsibility for any loss of either paddy or money, whatever the cause It was held that there was no real trust and that the accused was not guilty of criminal breach of trust in failing to devote the money to the purchase and transport of paddy[2]

The complainant owed money to the accused on a mortgage bond and on a certain day went to their house and paid the amount settled as due in full satisfaction of the bond. An endorsement of payment was made on the back of the bond by one of the witnesses for the prosecution and the accused went inside their house with the bond and money saying that they would keep the money and return the bond, but they did not come back that day and afterwards denied the receipt of the money. It was held that on the facts there was no trust which could bring the case within the terms of this section[3].

'Property' referred to in this section must be moveable property. Criminal breach of trust cannot be committed in respect of immoveable property. The accused was a Jemadar of an indigo factory and in such capacity was entrusted with dominion over certain plots of *zerait* land. His duty was to see that the plots were cultivated with indigo, but he knowingly allowed them to be cultivated with other crops. It was held that the accused was not guilty of criminal breach of trust[4]. The Madras High Court has remarked that the above case is based on the general assumption that if a man cannot move a thing away, he cannot dishonestly convert it to his own use In the majority of cases that assumption may be correct: but the wording of s. 405 is very comprehensive and it is dangerous to lay down any absolute rule[5]. Accused borrowed an agricultural engine from his relation, who was looking after it for the real owner He had also a lease of the engine from his relation. He sold the engine to his aunt. He was convicted of criminally misappropriating the engine, the breach of trust being alleged to consist in the sale of the engine "in violation of the trust". The engine was not moved from the place where it was put, and there was no evidence of an intention to move it either It was held that the accused was not guilty of any criminal offence[6].

The word 'property' includes the sale-proceeds of goods entrusted to the accused[7].

[1] *Po Seil*, (1912) 6 L. B. R. 62, F.B., followed in *Hol Chong & Co* v. *Tha Ka Do*, (1913) 7 L. B R. 10, F B

[2] *Po Yuet*, (1914) 7 L. B. R. 278.

[3] [illegible] (1917) 22 C. W. N. 1007.

[4] [illegible] *Bhag* [illegible] Unre. [illegible] 1924, (1925) 49 M. L. J. 30 (Notes of recent cases), *Chandan Lal*, (1926) 27 Cr. L. J. 760.

[5] *Rukmani Ammal*, (1925) 24 L. W. 609, 50 M. L. J. 94.

[6] *Ibid.*

[7] *Balthasar*, (1914) 41 Cal. 844; *Dwarkadas Haridas*, (1928) 30 Bom. L. R. 1270, 9 Bom. Cr C. 445.

A cancelled cheque falls within the term 'property'. The question of the value of the property in respect of which the breach of trust is committed, is, except so far as s. 95 of the Code is concerned, quite immaterial[1].

An association not expressly sanctioned by law, yet not criminal, is not incapable of holding any property at all[2].

'Dominion over property'.—The property regarding which the offence is alleged to have been committed must have been 'entrusted' to the accused or he must have 'dominion over' it. Where it is the duty of a Municipal Water Works Inspector to supervise and cheque the distribution of water from the municipal water-works, he has dominion over the water belonging to his employers. If he deliberately misappropriates such water for his own use or for the use of his tenants for which he pays no tax and gives no information to his employers he is guilty of criminal breach of trust[3].

If a mortgagor in possession, who is entrusted with the dominion over the mortgaged property by the mortgagee in whom the property is in a mortgage in the English form, wilfully defaults and causes the property to be sold for arrears of Government revenue for the purpose of defrauding the mortgagee, and purchases it *benami*, he is liable to be punished for this offence[4]. The accused hypothecated to the complainant by a written contract all his claims as a contractor against Government in respect of work done and materials supplied to the Executive Engineer, and undertook regularly and without fail to convey and make over to the complainant all cheques drawn by the Executive Engineer in his favour, and, subsequently, in violation of the said contract, cashed two such cheques, and appropriated the proceeds. It was held that the accused had committed criminal breach of trust[5].

Partner.—The words of the section are wide enough to include the case of a partner, if it be proved that he was in fact entrusted with the partnership property, or with a dominion over it, and had dishonestly misappropriated it or converted it to his own use[6]. A partner is entitled to be called upon for an account of the expenditure of the money, which he has received, and it is open to him to spend the money received by him and to account for it in dealing with the partnership. Where it was not satisfactorily made out that this was not done, and could not be made out in the absence of a proper demand for accounts, it was held that there was no dishonest conversion, which would justify his conviction under this section[7]. In the case of a charge of criminal breach of trust against a partner, the criminal Court should not entertain the case if the prosecution is unable to prove clearly and beyond doubt that the accused has acted dishonestly and with a view to enrich himself clandestinely at the expenses of those with whom he was working and with whom he was bound by a fiduciary relationship[8].

Auctioneer.—An auctioneer is not liable for criminal breach of trust merely because he does not punctually carry out every term in the agreement, e.g., as to the date of the sale and the time of payment of the proceeds[9].

1 *Maula Bakhsh*, (1904) 27 All. 28.
2 *Tankard*, [1894] 1 Q. B. 548.
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Wife.—A woman has a joint possession of her husband's property and cannot, therefore, be indicted for disposing of it in any way[1]. According to English law she can be convicted of larceny as a bailee[2].

Loan.—As observed before, if a sum of money is advanced by way of loan no criminal breach of trust is committed even if the borrower uses it for a purpose other than that for which the advance was made. The accused was given a sum of money for the purpose of buying paddy for the complainant. At the time of the adv[illegible] which he undertook to use the money solely i[illegible] paddy to the complainant. The value of the [illegible] arket rate of the day of delivery. The accused had also signed a demand promissory note for the amount of the advance. The accused failed to carry out the arrangement and was convicted of criminal breach of trust. It was held that the conviction was bad as the transaction amounted to a loan and not a trust[3].

Pledge.—A person who pledges what is pledged to him is guilty of this offence[4]. Where the accused, to whom a thing was not entrusted, was present and helped the other accused in pledging it, knowing that the other had no right to pledge it, it was held that though he could not be convicted of criminal breach of trust he would be guilty of abetment of that offence[5]. The accused was entrusted with a pair of earrings for the purpose of raising Rs. 7 only upon them for the com- [illegible] com- [illegible] what [illegible] Where the accused who had pledged promissory notes with the complainant as security for a loan dishonestly induced the latter to hand over the same to him by pretending that he required the same to collect money from his debtors with the aid of which he would pay cash to the complainant and the accused disposed of the notes in violation of his contract with the complainant, it was held that there was both entrustment and dishonest misappropriation and the accused was guilty of criminal breach of trust[7].

Where there is no condition attached to the contract of pledge, the pledgee has a perfect legal right to deal with the pledged property in any manner he chooses so long as he is within the rights that can be exercised by a bailee with regard to the property which is the subject-matter of bail. Consequently, no dishonest intention can be inferred from the fact of a sub-pledge by a pledgee[8].

Deposit.—The return of a deposit to the brother of a depositor under circumstances indicating the best of intention and an absence of moral turpitude, may render a person civilly liable to the depositor but does not amount to criminal breach of trust as that offence involves moral turpitude[9].

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[5] *Yeduha Subbaya*, [1912] M. W. N. 725, 23 M. L. J. 722, 12 M. L. T. 203.

[6] *Gurumahanty Appalasamy*, (1894) 1 Weir 464

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3 *Wong Yone Main*, (1911) 6 L. B. R. 46,

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10 *Maung Mya Gyi v. Nga Po Shwe*, (1914) 7 B. L. T. 222.

remain the absolute property of the company; and the accused agreed during the hiring not to "assign, underlet or part with the possession" of the car in any way. Whilst this agreement was in force the accused pledged the car to three different persons on three different occasions. The accused was convicted of the offence of criminal breach of trust for making those assignments. It was held that the pledging of the car by the accused was a violation of the legal contract made by him in regard to the hire of the car and that that violation was dishonest on the part of the accused[1]. The accused obtained a motor car from the complainant on a hire-purchase agreement, stipulating that so long as the whole amount of the price was not paid, the car would remain the absolute property of the complainant and that the accused would not in any way dispose of it. The complainant brought a suit for the recovery of the price still remaining due under the agreement and got a degree for a certain sum with costs, but no lien on the car was declared by the Court. Soon after this decree the accused sold away the car. It was held that the accused in disposing of the car, in contravention of the original hire-purchase agreement, did not commit an offence under this section, as the original contract was merged in the decree of the civil Court[2]. One C agreed to purchase a motor lorry from the owners, paying the price by instalments. Meanwhile he signed an agreement with the owners by which, describing himself as "the hirer," he undertook to pay certain instalments; to insure the vehicle hired; not to deal with it; to allow the owners to recover possession in case of default in payment of instalments; and he admitted that the lorry would remain the property of the owners until all the instalments due were paid. It was held that C, having, in spite of his agreement, sold the lorry before the instalments were paid, was guilty of criminal breach of trust[3].

Disputed claim.—The accused was employed by the complainant and others to take their paddy for sale and he sold it to a Marwari. The complainant stated that the accused had withheld from him a portion of the money due from the sale of his paddy. There was a dispute between the parties as to the number of bags that were given to the complainant by the accused, and the defence was that some of the bags, for which the price was claimed by the complainant, were bags given to the accused by another man who had filed a suit against the accused to recover their price. It was held that the accused could not be convicted of criminal breach of trust on refusing to give to the complainant money, which was claimed by another person as well as by the complainant[4]. Where the accused still retains dominion over the property and has some claim to it, even if it turns out not to be sustainable in law, there is no offence unless the claim is merely a pretence and not bona fide[5].

Debt is not trust.—Upon a charge for criminal breach of trust the accused pleaded that the amount claimed by the complainants was due to them as a debt, but having sustained losses in business they were unable to pay it. It was held that in such cases the crucial test is, was the sum due to complainants owed by the accused as a debt, or was it held by them as trust money for complainants over which they had no right of disposition of any kind[6]?

2. 'Dishonestly misappropriates or converts to his own use that property'.—Dishonest intention is the gist of the offence[7]. As to the meaning of 'dishonestly' see s. 24, *supra*. The offence of criminal breach of trust is completed by the misappropriation or the conversion of the property dishonestly. It is only

1 *Moses*, (1915) 17 Bom. L. R. 670.

2 *Cohen* v. *Sasi Bhusan Das Gupta*, (1917) 18 Cr. L. J. 728.

3 *Cadd*, (1923) 45 All. 588. Reference to s. 420 in the headnote is wrong.

4 *Raj Kishore Patter* v. *Joy Krishna Sen*, (1900) 28 Cal. 362.

5 *Harry Jones*, (1924) 28 C. W. N. 831.

6 *Raushan Rai*, (1901) P. R. No. 322 of 1901.

7 *Rahim Baksh*, (1879) P. R. No. 30 of 1879; *Ponnambalam Pillai*, (1883) 1 Weir 462; *Murphy*, (1887) 9 All. 666; *Girsham* v. *Mutusamy*, (1909) U. B. R. (P. C.) 21.

the intention which is essential; whether wrongful gain or loss actually results is immaterial; it is a consequence, but no essential part of the offence, and a person is not accused of the offence by reason of it[1].

If, instead of denying the appropriation of property, the accused, in rendering his account, admits the appropriation, alleging a right in himself, no matter how unfounded, or setting up an excuse, no matter how frivolous, this offence will not be committed[2]. Bare refusal by the accused to allow the removal of a box left in his house by the complainant unless some debt due to him by the complainant was paid, is held not to amount to a criminal breach of trust[3]

Where an agent receives money on behalf of his principal, the money so received is the property of, and is owned by, the principal, and if such agent refuses, at the request of the person paying the money to refund it, he is not criminally liable, and, consequently, cannot be prosecuted for criminal breach of trust, as the gist of that offence is the dishonest misappropriation or the conversion by one to his own use of the property of another which has been entrusted to him[4]

'Misappropriates'.—"There may be appropriation by a mental act without any actual expenditure of the money thus appropriated The fact that the money has not been expended is a circumstance to be taken into account as evidence in favour of the view that there [illegible]
stance is not conclusive that th[illegible]
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expenditure of the money is not the only proof of it"[5].

Dishonest conversion.—Where a Magistrate made over a pony, which had been condemned by the municipal authorities as unfit for work, to a person professing to be the secretary of a society for the maintenance of incurable animals, and as such secretary agreed to take charge of the pony, but afterwards sold it to an *eka* (one horse carriage) driver[6], this offence was held to have been committed.

A lady wishing to get a railway ticket, finding a crowd at the pay-place at the station, asked the accused, who was nearer to the pay-place to get a ticket [illegible] the ticket was 10s. [illegible] immediately ran [illegible] at common law, as the lady being present retained the dominion and possession, in point of law, after she had handed it to him for the intended purpose[7].

[illegible]

Where a municipal board undertakes house scavenging by means of "customary sweepers", the rubbish and night-soil collected by the sweepers is the property of the board. Hence, where a sanitary inspector, having induced the [illegible]

Stake-holder.—A stake-holder, who misappropriates to his own use the stakes deposited with him for a wager, is guilty of criminal breach of trust[10].

1 *Rambilas*, (1914) 38 Mad. 639
2 *John Norman*, (1842) Car. & M. 501.
3 *Adinarayana Iyer*, (1907) 17 M. L. J. 413
4 *Ram Khelawan Thakur*, (1919) 20 Cr. L. J. 654
5 Per Plowden, J., in *Kesho Ram*, (1889) P. R. No. 30 of 1889.
6 *Gauri Shankar*, (1894) 14 A. W. N. 197.
7 *George Thompson*, (1882) 32 L. J. (M. C.) 53
8 [illegible]

3. 'Dishonestly uses or disposes of that property in violation of any direction of law...or of any legal contract...touching the discharge of such trust or wilfully suffers any other person so to do'.—A user of property comes within this definition when such user causes substantial or appreciable loss to the owner of the property or gain to the accused. The use by a printer of certain blocks entrusted to him to print the complainant's catalogue for the purpose of printing a rival firm's catalogue amounts to criminal breach of trust[1]. But the Madras High Court has held that for either wrongful loss or gain the property must be lost to the owner or the owner must be wrongfully kept out of it. The deterioration of an article, such as a turban, by use, is, according to its opinion, not such a loss of property to its owner, and the wrongful beneficial use of property by the accused is not such a gain to him[2].

Where a sum of money is placed in the hands of a person under a lawful agreement which, however, becomes subsequently incapable of execution, and is retained by him afterwards against a debt due to him, he cannot be held guilty of criminal breach of trust[3].

Wilful omission to account.—If a person receives money which he is bound to account for and does not do so, he commits this offence, although no precise time can be fixed at which it was his duty to pay over the money[4]. "Where money is entrusted for a particular purpose, the owner cannot know that it has been misappropriated until the person to whom it has been entrusted fails to account for it. On the other hand, when the latter fails to account for the money entrusted to him, the owner naturally comes to the conclusion that he has dishonestly misappropriated it. Whether a civil suit for account does or does not lie, and whether the complainant or informant has or has not been led to institute criminal proceedings, merely because he has not got an account, are immaterial. The question is whether the facts constitute the offence defined in this section"[5].

If a servant immediately on receiving a sum for his master, enters a smaller sum in his master's books and ultimately accounts to his master for the smaller sum, he may be considered as embezzling the difference at the time he makes the entry. It will make no difference though he received other sums for his master the same day, and in paying those and the smaller sum to his master together, he might give his master every piece of money or note he received at the time he made the false entry[6].

It is not necessary to prove that any particular sum or sums were received from any particular person. Where the accused had debited himself with an amount, forming the balance of a large number of receipts and payments, this was held sufficient[7].

The position of a shroff of a Battery with reference to the custody of the Government moneys entrusted to him being that of a cashier, his failure to produce the entire amount of the balance of cash entrusted to him amounts to criminal breach of trust[8].

It was the duty of a servant, authorized to receive money for his employer, to account to his employer on the evening of every day for the money received during the day by him for his employer, and to pay over the amount. He received three sums for his employer on three different days, and neither accounted for those sums nor paid them over. He never denied the receipt of them, nor rendered any written account in which they were omitted. It was held that, if the servant wilfully omitted to account for these sums, and pay them over on the respective

1 *Keshab Chandra Boral* v. *Nityanund Biswas*, (1901) 6 C. W. N. 203.
2 (1866) 3 M. H. C. App. 6.
3 *Puran*, (1925) 27 Cr. L. J. 383.
4 *Welch*, (1846) 1 Den. 199.
5 Per Shaw, J. C., in *Girsham* v. *Mutusamy*, (1909) U. B. R. (P. C.) 21, 22.
6 *John Hall*, (1821) R. & R. 463.
7 *Lambert*, (1847) 2 Cox 309.
8 *Hira Lal*, (1907) P. R. No. 19 of 1908.

days on which he received them, they were embezzlements, and that such wilful omissions to account and pay over were equivalent to a denial of the receipt of them[1]. If a public servant in his capacity as such receives money on a certain date and does not include it in his cash balance entered in the register which he is required to maintain; there is very strong *prima facie* evidence of the money having been misappropriated on that date, and he is guilty of embezzlement if he does not hand over to his successor the money in his hands due to Government[2].

False accounting.—The accused had received a cheque which he was to get cashed, and lay out the proceeds in the market. He did cash it, but did not lay out the proceeds as he ought to have done, and in the prosecutor's books gave a wrong account of the manner in which the money had been expended. It was held that this offence had been committed[3]

'In violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract touching the discharge of such trust'.—The misappropriation, conversion, etc., must be in violation of a legal direction prescribing the mode in which the person entrusted with the property is to carry out the trust or the contract. Where the accused were entrusted with some silver for the purpose of making ornaments and they introduced copper into the ornaments, it was held that they were guilty of criminal breach of trust[4]

[illegible] under an agreement that property [illegible] on to take them and paid cash in [illegible] the trust continues till the option is exercised and cash payments made, and he commits criminal breach of trust if he sells them without such payments[5].

The servant of a liquor contractor was entrusted with liquor by his master to sell. For selling it, he was to receive a certain quantity himself, and he was to account for the remainder to his master, with whom he made a legal contract that he would not adulterate it with water before selling it. In violation of that [illegible] ount, [illegible] and [illegible] thus gained by unlawful means money to which he was not legally entitled, he acted dishonestly within the meaning of the Code, and was guilty of criminal breach of trust[6]. In both the cases the accused were entrusted with property for a particular purpose and there was a contract with them which they violated. If the contract itself is illegal no conviction can be sustained even if there is misappropriation in [illegible]

[illegible] this case the accused had started a betting business, the principal object of which was to provide facilities to constituents to back horses at various race meetings in India. He was to remit sums furnished by customers to some person present at the race meeting, who would put them on selected horses either through totalizer or otherwise. Certain sums of money were placed in his hands as bets on horses running in Poona races, but he did not forward the money to Poona and misappropriated the sum[7]. But where an Assistant Station Master, whose duty it was to issue tickets to the passengers and to charge fares as fixed by the railway, made an overcharge over some of the tickets and did not credit the excess so

[1] *Jackson*, (1844) 1 C. & K. 384; *Charles Lister*, (1856) 26 L. J. (M. C.) 26; *Chandra Prasad*, (1926) 5 Pat. 578.

[2] *Daya Shankar*, (1926) 1 Luck 345; *Dewasi Khamani Asari*, (1925) 23 L. W. 718.

[3] *Goodenough*, (1853) 6 Cox 206; see also *Guelder*, (1860) 8 Cox 372.

[4] *Babaji bin Bhau*, (1867) 4 B. H. C. (Cr. C.) 16.

[5] *Khitish Chandra Deb Roy*, (1924) 51 Cal 796.

[6] *Jamsetji*, (1888) Cr. R. No. 53 of 1888, Unrep. Cr. C. 395.

[7] *Uppasini*, (1926) 52 M. L. J. 179.

realized to the railway, it was held that he was not guilty of criminal breach of trust as he was not a trustee within the meaning of this section. The Court observed: "A trustee is a person in whom is invested the legal or formal interest in property, the equitable or beneficial interest vesting in and belonging to some other person. In the present case it is beyond doubt that the legal and the beneficial interest both vested in and belonged to one and the same person, viz., the petitioner, the railway having no beneficial interest in the money dishonestly recovered and in fact in direct contravention of their own instruction"[1].

'Wilfully suffers any other person so to do'.—See comment on s. 477 A, *infra*, as to the meaning of the word 'wilfully'.

No breach of trust if there is no dishonest use or disposal.—Where a cloth was entrusted to the accused, a washerman, on the understanding that it was not to be washed by men of certain class, and the accused allowed the article to be worn by the prohibited class, the article being thereby rendered valueless to the owner[2]; where the accused refused to give up land alleged to have been mortgaged[3]; where the accused did not immediately apply the money for the purpose for which it was intended[4]; where the mother of a child recently vaccinated accepted two annas from a vaccinator under promise to take the child to another village where the vaccinator wanted to take lymph out of the baby and she subsequently refused to take the child there[5]; where a Sub-Inspector of Police purchased a pony which had been impounded[6]; and where the accused failed to deliver the full quantity of hides entrusted to him as the tindal of a cargo boat to be carried on a steamer[7], this offence was not committed. Where the accused were entrusted by a Court officer with certain moveable property attached in execution of a decree, but at the time of sale they did not produce the property and evaded the service of notice, it was held that they could not be guilty of criminal breach of trust inasmuch as they did not misappropriate the property or convert it to their own use or dispose of it in any manner contrary to the terms of the trust[8].

PRACTICE.

Evidence.—Prove (1) that the accused was entrusted with property or with dominion over it[9].

(2) That he (*a*) misappropriated it, or (*b*) converted it to his own use, or (*c*) used it, or (*d*) disposed of it.

(3) That he did so in violation of (*a*) any direction of law prescribing the mode in which such trust was to be discharged, or (*b*) any legal contract, express or implied, which he had made touching the discharge of such trust[10]; or that he wilfully suffered some other persons to do as above.

To make out a case of criminal breach of trust it is not sufficient to show that money has been retained. It must also be shown that the accused disposed of it in some way other than that in which he was bound to apply it and that he did so dishonestly. The mere fact that the accused did not at once apply the money to the purpose for which it was intended does not amount to criminal breach of trust. There must be some dishonest use of money to constitute the offence[11]. Mere retention of money does not necessarily raise a presumption of dishonest-

1 *Kudrat Nath*, (1922) 6 L. L. J. 125, 127.
2 (1880) Weir (3rd Edn.) 269.
3 *Jaffir Naik*, (1864) 2 B. H. C. 127.
4 *Ardeshir Merwanjee*, (1889) Cr. R. No. 50 of 1889, Unrep. Cr. C. 484.
5 *Salawa*, (1891) Unrep. Cr. C. 557.
6 *Rajkristo Biswas*, (1871) 16 W. R. (Cr.) 52.
7 *Ramaya*, (1904) 10 Burma L. R. 170.
8 *Harnam Singh*, (1918) 16 A. L. J. 600.
9 *Gouri Narayan Barrua* v. *Tibikram Chetri*, (1921) 25 C. W. N. 838.
10 *Pritchard*, (1928) 30 Cr. L. J. 18.
11 *Nga Hmu*, (1901) 1 U. B. R. (1897-1901) 345; *Parmod Ban Behari Saran*, (1927) 29 Cr. L. J. 90.

misappropriation to one's own use, but dishonest misappropriation may sometimes be inferred from the circumstances without direct evidence[1].

(4) That he acted as in (2) dishonestly[2].

Where the accused admits having received the money alleged to have been misappropriated by him, but defends himself by saying that he made it over to the proper person, the onus does not lie on him to prove payment, but on the prosecution to prove non-payment, for it is only when the latter is proved that a presumption will arise of misappropriation or breach of trust[3]

Evidence given of acts of embezzlement other than those charged in the indictment.—An indictment charged the accused with having embezzled three sums of £2, the money of his employers, he being clerk or servant. Evidence was given of the embezzlement of these sums, and it was then proposed to give evidence of other sums not charged in the indictment but which had also been embezzled, to show that if it should be contended the sums charged in the indictment were subject of a mistake in the keeping of the accounts, there being many other sums unaccounted for, admitting evidence of such sums would assist the Court in determining what value was to be attached to the suggestion It was held that such evidence was admissible[4].

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable-Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class

In a case of criminal breach of trust arising out of the misppropriation of a number of sums, the proper course is for the prosecutor to select three items on which to proceed in the first instance and to give some general evidence as to the amount believed to have been misappropriated[5]. In view of s 222 (2) of the Criminal Procedure Code this is not necessary, but if it is done the accused cannot complain of multifariousness Where a person receives money for the express purpose of using it for his master's benefit in a particular way, he is entrusted with money, and his misappropriation of it to himself amounts to criminal breach of trust; and consequently a conviction for criminal breach of trust committed by misappropriation of a large sum of money made up of various items (more than three in number) on false pretences is not illegal[6]

The offence of criminal breach of trust involves entrustment or dominion over property and dishonest misappropriation, conversion, use or disposal thereof. It is not possible to find these elements unless one can form a conception as to what that property is There must, therefore, be a definite finding of a certain definite sum traced to the accused in order to form the basis of his conviction[7].

Agreement to refund does not bar prosecution.—An agreement between the prosecutor and the accused that the money embezzled shall be refunded cannot be pleaded in bar of the prosecution[8].

Venue.—The offence of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed[9].

1 *Nga Tha Zan*, (1905) U B R (P. C.) 19.

2 *Nagappa Malkappa*, (1907) 9 Bom. L. R. J. 120.

3 *Hari Daplu*, (1896) Cr. R No. 47 of 1896, Unrep. Cr. C. 872, *Ramchandra Ganesh*, (1896) Cr. R. No. 27 of 1896, Unrep Cr. C. 860

4 *Richardson*, (1861) 8 Cox 448; *William Prond*, (1861) 9 Cox 22

5 *Vallikkat Govinda Menon*, (1885) Weir (3rd Edn.) 270.

6 *Theophilus Ramappa*, (1912) 22 M. L. J. 112, 12 M. L. T. 201.

7 *Khirode Kumar*, (1924) 29 C. W. N 54, 40 C. L. J. 555.

8 *Mayandi Pillai*, (1886) 1 Weir 462; *Ramasami Nadan*, (1883) 1 Weir 465

9 Criminal Procedure Code, s. 181

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*), as follows:—

That you, on or about the——day of——, at——, being entrusted with certain property, to wit——, committed criminal breach of trust; and that you thereby committed an offence punishable under s. 406 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

When the accused is charged with criminal breach of trust, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence: Provided that the time included between the first and last of such dates shall not exceed one year[1]. Prior to the enacting of this clause there was a difference of opinion between the various High Courts as to the legality of charging a person for a general deficiency without specifying particular items or exact dates. This clause is in accordance with the present English law. Where an accused person is charged with having misappropriated or committed criminal breach of trust in respect of an aggregate sum of money, the whole sum being alleged to have been wrongfully dealt with by the accused within a period not exceeding one year, the mere fact that the items composing such aggregatge sum are specified and may be more than three in number wil. not render the charge obnoxious to the prohibition implied by s. 234 of the Code of Criminal Procedure[2]. In a charge of criminal misappropriation there were three counts. Each count specified the sum of money alleged to have been missappropriated by the accused on a particular day; but in two out of the three cases the total sum consisted of three separate items in each instance. It was held that a charge so framed did not offend against s. 234 of the Code of Criminal Procedure[3]. An accused person was tried for criminal breach of trust in respect of three distinct sums, and one charge was drawn up specifying all the three sums and the persons from whom he collected them. He was not charged with three offences, but with one offence under s. 409 and was convicted and sentenced to one term of imprisonment. It was held that the charge as framed was not contrary to law, it being in accordance with s. 222, sub-s. (2), and s. 234 of the Code of Criminal Procedure[4].

Where the charge against the accused was to the effect that he on or before June 21, 1907, committed breach of trust in respect of some deeds which he took from the complainant and was thereby guilty of an offence punishable under this section, but at the trial he was convicted of embezzling not the deeds but amounts obtained by dealing with those deeds, it was held that the conviction was bad[5].

Punishment.—A case of embezzlement of money is not a case contemplated by s. 62; and hence, in a sentence under this section, the Court is not competent to order that the rents and profits of the property of the accused should be forfeited to Government during the period of his imprisonment[6].

1 Criminal Procedure Code, s. 222 (2). The cases of *Ramchandra Govind Harshe,* (1895) 19 Bom. 749; *Luchminarain,* (1886) 14 Cal. 128; *Pursotam Dass Morarjee,* (1896) 24 Cal. 193; *Chetter,* (1871) 15 W. R. (Cr.) 5; *Ekram Aly,* (1898) 2 C. W. N. 341; are no longer of any authority. See *Kellie,* (1895) 17 All. 153; *Buddhu* v. *Babu Lal,* (1895) 18 All. 116.

2 *Gulzari Lal,* (1902) 24 All. 254.

3 *Ishtiaq Ahmed,* (1904) 27 All. 69.

4 *Sat Narain Tewari,* (1905) 32 Cal. 1085.

5 *Bipra Das Giri* v. *Niradamoni Bew,* (1908) 12 C. W. N. 577; *Balthasar,* (1914) 41 Cal. 844.

6 *Amrit Lal,* (1906) 29 All. 25.

407. Whoever, being entrusted with property as a carrier[1], wharfinger[2] or warehouse-keeper[3], commits criminal breach of trust in respect of such property shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Criminal breach of trust by carrier, etc.

COMMENT.

Those who receive property under a contract, express or implied, to carry it or keep it in safe custody are punishable under this section for a criminal breach of duty with respect to such property. The persons specified in this section are alike in being entrusted with the custody of property for which they are remunerated, their employment being not continuous, but intermittent and in relation to specific goods.

1. **'Carrier'.**—A 'carrier' is a person who undertakes to transport the goods of other persons from one place to another for hire[1] Any one who undertakes to carry the goods of all persons indifferently for hire, is a common carrier[2]. Railway companies are carriers[3].

2. **'Wharfinger'.**—The term 'wharfinger' means a person who owns or keeps a wharf, which is ' a broad plain place, near some creek or haven, to lay goods and wares on that are brought to or from the water'[4].

3. **'Warehouse-keeper'.**—One who keeps a warehouse, which is a house to deposit or keep wares in. Ware is an article of merchandise, fabric, especially in the plural, goods, commodities, merchandise.

PRACTICE.

Evidence.—*Prove (1) that the accused is a carrier, wharfinger, or warehouse-keeper.*

(2) That he was as such entrusted with the property in question.

(3) That he committed criminal breach of trust in respect of it[5].

See the Indian Evidence Act, s. 15 (*b*)

To establish the essential elements of this offence it is necessary to show at least that some of the property entrusted to the accused cannot be accounted for by him[6].

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Place of trial.—Where the accused was entrusted with the carriage of a quantity of coffee from an estate in Mysore to a merchant firm in Mangalore, and a portion of the goods was abstracted and there was no evidence as to when or [illegible]

entrustment[7].

Charge.—I (*name and office of Magistrate, etc*.) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, being entrusted with property, to wit——, as a carrier [*or* wharfinger, *or* warehouse-keeper] committed

[illegible] Their

[5] *Vide*, s. 406, sup.

[6] *Parabhu Ghatgappa*, (1907) 9 Bom. L. R. 229.

[7] *Public Prosecutor* v. *Podimoney Beary*, (1928) 52 Mad. 61

criminal breach of trust in respect of such property; and that you thereby committed an offence punishable under s. 407 of the Indian Penal Code and within my cognizance [*or* within the cognizance of the Court of Session (*or* High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Criminal breach of trust by clerk or servant.

408. Whoever, being a clerk[1] or servant[2] or employed as a clerk or servant[3], and being in any manner entrusted in such capacity with property[4], or with any dominion over property[5], commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

Section 381 punishes theft by a clerk or a servant. This section inflicts enhanced punishment on such a person for criminal breach of trust.

Scope.—The offence is committed even where the act of the accused is to cause wrongful loss to his master for a time only[1].

1. 'Clerk'.—In modern usage this word means a writer in an office, public or private, either for keeping accounts or entering minutes. See s. 381, *supra*.

2. 'Servant'.—Master and servant, a relation whereby a person calls in the assistance of others, where his own skill and labour are not sufficient to carry out his own business or purpose[2]. See s. 381, *supra*. A person hired by a market gardener to do a day's work and sent by him to sell vegetables at market and bring back the proceeds is a servant to his employer in respect of such employment[3]. A person engaged by a trading firm on commission to make purchases under instructions from the firm is a servant of the firm[4].

3. 'Employed as a clerk or servant'.—If a person acts as a clerk or servant although there is no contract binding on him to work, yet so long as he does the duties he will come under the category of clerk or servant[5].

If a servant receives money on his employer's account and embezzles it, he is guilty of a felony, though his employers had no right to it and were wrong-doers in receiving it[6].

4. 'Entrusted in such capacity with property'.—The property must have been entrusted to the accused in his capacity of a clerk or a servant[7]. If it is not entrusted in such capacity the clerk or servant will be liable under s. 406 and not under this section.

If a servant secrete moneys which his master has marked and sent by a friend to make a purchase at his shop, with a view to try the honesty of the servant, it is a felonious breach of trust[8].

Accused was engaged by the complainant as a tonga driver on a monthly salary of Rs. 15 to drive the tonga on hire within the limits of the Ludhiana Municipality. He was to bring the tonga back each evening and pay over his earnings to the complainant. He did not return one evening and on the following day was

1 *Tulsidas Chhaganlal*, (1906) 8 Bom. L. R. 951.

2 Wharton, 13th Edn., p. 550.

3 *Winnall*, (1851) 5 Cox 326. See *Pyo Gyi*, (1919) 10 L. B. R. 31, 12 B. L. T. 31.

4 *Pyo Gyi*, *ibid.*

5 *Foulkes*, (1875) L. R. 2 C. C. R. 150. See *Karim-ud-din*, (1918) 40 All. 565.

6 *Richard Beacall*, (1824) 1 C. & P. 454.

7 (1865) 3 W. R. (Cr. L.) 12.

8 *William Headge*, (1809) 2 Leach 1033.

pursued and arrested at a place several miles from Ludhiana driving the tonga rapidly. The accused was convicted of an offence under this section by the Magistrate but acquitted on appeal to the Sessions Judge who found that there had been no criminal breach of trust as the accused had not disposed of the tonga. It was held that there was no doubt that the accused intended to deprive his master of the tonga and that his intent or mental act of his was the gist of the offence of criminal breach of trust and he was therefore guilty of an offence under this section[1].

5. **'Or with any dominion over property'.**—If a clerk or servant who has dominion over the property of his master in some way or other misappropriates or converts to his own use such property he commits criminal breach of trust. For instance, where it is the duty of a Municipal Water-works Inspector to supervise and check the distribution of water from the Municipal Water-works, he has dominion over the water belonging to his employers. If he deliberately misappropriates such water for his own use or for the use of his tenants for which he pays no tax and gives no information to his employers he is guilty of criminal breach of trust[2] Where a Municipal Water-works Inspector, being the lessor of a house within municipal limits which he had sub-let, had such house connected with a municipal water main and accepted a yearly payment as water-tax from his tenants, but neither informed the municipal board that the connection had been made nor credited to the board the money which he received as water-tax from his tenants, it was held that he was properly convicted under this section[3].

Commission obtained by a servant.—The principle applying to cases where a servant employed to pay a bill for his master, obtains a commission or a reduction of a price for his own benefit, has been thus laid down —"If the account is an *open* one, that is, an account of which the items have never been checked or settled, and if the transaction amounts to a taxation of the bill and a reduction of the price by the servant, it is obvious that the servant obtains the reduction for his master, that the money in his hands always remains the master's property, and that if he appropriates it, he steals it. But if the master himself has *settled* the account with the tradesman for a specific sum, and he sends the servant with the

[illegible]

a criminal offence, and I do not think he can be convicted of criminal breach of trust merely because, by a mere equitable doctrine of the Court of Chancery, it was obligatory upon him to render an account"[4].

CASES.

Conversion by a servant under a special trust.—Where a Court Inspec- [illegible] the custody, etc., of Government moneys [illegible] himself from loss in case of defalcation, [illegible]

[1] *Dina*, (1925) 6 Lah 257.
[2] *Bimali Charan Roy*, (1913) 35 All. 361.
[3] *Ibid.*
[4] Per Petheram, C. J., in *Imdad Khan*, (1886) 8 All. [illegible]. See *U Maung* [illegible] (1926) 4 [illegible] where the commission was obtained by the Vice-President of a [illegible]

capacity[1]. A servant, who received money for a specific purpose, and did not use it for that purpose, and, on being called on to account for the money, falsely said that he used it for that purpose, was held to have committed this offence[2].

If a servant immediately on receiving a sum for his master enters a smaller sum in his master's books, and ultimately accounts to his master for the smaller sum, he may be considered as embezzling the difference at the time he makes the entry. It will make no difference though he received other sums for his master the same day, and in paying those and the smaller sum to his master together, he might give his master every piece of money or note he received at the time he made the false entry[3]. The accused was given money by complainant company to purchase specified paddy at specified prices. He was to be paid all expenses incurred in purchasing the paddy and bringing it to the mill, and was to receive a commission of rupee one per hundred baskets. This commission was his only form of remuneration, and he could not suffer any loss by the transaction. It was held that the accused was a servant of the company in this transaction, that the money was entrusted to him for a specific purpose, and that the accused was guilty of criminal breach of trust under this section[4].

Property must have been entrusted to a person as a clerk or servant.—A station master on the East Indian Railway, under an arrangement with the company, received a fixed allowance in respect of the marking, loading aed unloading work at his station and used to engage his own men for that purpose. One of such men, engaged as a marksman, was first allowed to keep certain registers, which it was the duty of the station master to maintain, and next allowed to receive cash payments and make entries in the cash register. Whilst so employed, he received a sum of Rs. 5-10-0 as an overcharge or demurrage in respect of certain goods which passed through his hands, and appropriated the same. To this sum, however, the railway company made no claim. He was also alleged to have received and appropriated to his own use two other sums of money under somewhat similar circumstances. In respect of these three sums he was tried and convicted on three counts under s. 408. It was held that the offence, if any, committed with regard to the sum of Rs. 5-10-0 did not fall within this section at all, and, this being so, the joinder of the three charges in one trial was illegal[5].

Using the property entrusted for the benefit of another person.—Where a person entrusted another with some blocks of wood-engraving to print his catalogue, and that other person used the blocks or allowed other persons to use the blocks to print a rival firm's catalogue, it was held that such dealing with the blocks was a violation of an implied contract and caused wrongful gain to the accused, for he obtained a catalogue at a less expense, and wrongful loss to the owner, inasmuch as his property deteriorated in value, and therefore constituted criminal breach of trust[6].

Appropriation by a servant of property ordered to be destroyed.—The accused, a servant, was ordered by his employers to take certain bags of papers and forms belonging to them to their yard and there to burn and destroy them. Instead of doing this, the accused carried the papers away to a certain place. It was held that the act of the accused did not amount to this offence[7]. Where a currency note was cancelled by tearing off certain parts, but the further process of cutting it into pieces and then destroying it by burning remained, it was held that

1 *Banee Madhub Ghose*, (1867) 8 W. R. (Cr.) 1. This case has been modified by *Ram Dhun Dey*, (1870) 13 W. R. (Cr.) 77, in which conviction under s. 409 was maintained.

2 *Watson & Co.* v. *Golab Khan*, (1868) 10 W. R. (Cr.) 28. See also *Lolit Mohan Sarkar*, (1894) 22 Cal. 313.

3 *John Hall*, (1821) R. & R. 463.

4 *Pyo Gyi*, (1919) 10 L. B. R. 31, 12 B. L. T. 31.

5 *Karim-ud-din*, (1918) 40 All. 565.

6 *Keshab Chandra Boral* v. *Nityanund Biswas*, (1901) 6 C. W. N. 203.

7 *Preo Nath Chowdhry*, (1902) 29 Cal. 489.

such a note though cancelled was not *res nullius* and could be the subject-matter of theft. The Court observed: "A very clear distinction must be drawn between an intention to destroy and to abandon and an actual destruction and abandonment. The very fact that the owner of the property intends to destroy or abandon that

[illegible]

still in the hands of the owner to countermand such destruction or abandonment the property is still the property of the owner and the taking it out of his possession is theft, and improper use of it is breach of trust"[1].

PRACTICE.

Evidence.—Prove (1) that the accused was the clerk or servant of the person reposing trust

(2) That he was in such capacity entrusted with the property in question or with dominion over it.

(3) That he committed criminal breach of trust in respect of it[2]

Actual conversion need not be proved. A mental act of fraudulent appropriation may be inferred from conduct[3]

To support a conviction for abetment of criminal breach of trust by a servant it must be proved that the transaction was a dishonest transaction, that the accused knew that, in respect of such transaction, the servant was acting dishonestly and was committing a breach of trust, and that he abetted the servant in effecting it[4]

[illegible] is held to [illegible] er[5].

[illegible] to return *or to account or gives an account which is shown to be false and incredible*, it is ordinarily a reasonable inference that he has criminally misappropriated the property so entrusted to him and dishonestly converted it to his own use In such cases the Courts are entitled to draw hostile inferences and presumptions from the action and statements of the servant[6].

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Jurisdiction.—The Court, within whose jurisdiction the consequence of an accused's act occurs, can inquire into the charge[7]. Where the complainant residing at Rangoon entrusted certain negotiable securities to the accused at Rangoon with instructions to proceed up-country and collect the amounts due upon them at various places and to account for the receipts at Rangoon, it was held that the offence of criminal breach of trust in respect of the proceeds of such collection can be tried by the Rangoon Courts[8].

Charge.—Where an accused person was charged under this section with having committed criminal breach of trust in respect of a gross sum of money misappropriated by him within the period of one year and the charge specified not only the gross sum taken and the dates between which it was taken, but also set out the items, twenty-two in number, composing such gross sum, giving the dates and the amount alleged to have been misappropriated on each date, it was

1 *Moti*, (1923) 17 S. L. R. 260, 262.
2 *Vide* s. 406, sup
3 *Kesho Ram*, (1889) P. R. No. 36 of 1889.
4 *Bal Gobind Shaha*, (1900) 4 C. W. N. 303.
5 (1880) 1 Weir 494
6 *Sona Meah*, (1924) 2 Ran. 476.
7 *O'Brien*, (1896) 19 All. 111.
8 *Yacoob Ahmed* v. *V. M. Abdul Ganny*, (1928) 6 Ran. 380; *Public Prosecutor* v. *Ponnamma Beary*, (1928) 30 Cr. L. J. 245.

held that the charge came within s. 222 (2) of the Criminal Procedure Code, and that by specifying the items composing the gross sum the charge went beyond what was necessary and was to that extent favourable to the accused[1].

The charge should run thus:—

I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, being a servant in the employment of AB, and in such capacity entrusted with [*or* with dominion over] certain property, to wit——, committed criminal breach of trust with respect to the said property, and thereby committed an offence punishable under s. 408 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*) on the said charge.

Criminal breach of trust by public servant, or by banker, merchant or agent.

409. Whoever, being in any manner entrusted with property[1], or with any dominion over property in his capacity of a public servant[2] or in the way of his business as a banker[3], merchant[4], factor[5], broker[6], attorney[7] or agent[8], commits criminal breach of trust in respect of that property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section classes together public servants, bankers, merchants, factors, brokers, attorneys and agents. As a rule the duties of such persons are of a highly confidential character, involving great powers of control over the property entrusted to them; and a breach of trust by such persons may often induce serious public and private calamity. "In order to bring a case within s. 409 it is...necessary to show that property was entrusted to a public servant and that he accepted the property entrusted, being in his public capacity required or authorized to accept it. Otherwise in accepting the property he acts as a mere volunteer, and is not entrusted with it in his capacity of a public servant. It is not..sufficient to show merely that a person delivered the property to him because he was a public servant. The motive which induced the person to deliver the property cannot alone determine the quality of the trust created. The mistaken belief of the person delivering the property or of the person accepting it, or of both, that the latter was authorized to receive it in his public capacity cannot alter the facts and supply the deficient and requisite authority so as to convert simple breach of trust into breach of trust by a public servant"[2]. This section cannot be construed as involving that any head of an office, who is negligent in seeing that the rules about remitting money to the Government treasury are observed is *ipso facto* guilty of the offence of criminal breach of trust; but something more than that is required to bring home the dishonest intention, which is one of the essentials of the offence. There should be some indication which justifies a finding that the accused definitely had the intention of wrongfully keeping Government out of the moneys; and ordinarily

1 *Samiruddin Sarkar* v. *Nibaran Chandra Ghose,* (1904) 31 Cal. 928. See *Gulzari Lal,* (1902) 24 All. 254; *Raman Lal,* (1926) 25 A. L. J. 217.

2 Per Plowden, J., in *Bhag Singh,* (1876) P. R. No. 24 of 1876, p. 46; *Banee Madhub Ghose,* (1867) 8 W. R. (Cr.) 1.

8. 'Agent'.—An agent is a person employed to do any act for another or to represent another, in dealings with a third person[1]. The word "agent" will apply only to persons whose occupation is similar to those enumerated in this section[2].

CASES.

Guilty.—Public servant.—Where a constable dishonestly misappropriated to his own use the pay of his *thana* police entrusted to him[3]; and where the Head Clerk of an office entrusted the management of stamps, with the knowledge and sanction of his superiors, to one of his assistants, and the latter stole stamps[4], it was held that this offence had been committed. Where the accused, a cattle pound-keeper, having levied Rs. 5 for five buffaloes in his charge, gave a receipt for Rs. 4 only to the owner of the cattle, and entered only Rs. 4 in his accounts, but subsequently altered the accounts and entered the proper amount, namely, Rs. 5, it was held that the conviction should be under this section and s. 511[5]. A traveller, with a considerable property, partly in cash and partly in gold coins, put up at a *serai* (inn), and believing himself to be dying, sent for a police-officer for protection of his property. The accused went to the *serai*, and received charge of the property. It was held that the accused was entrusted with the property in his capacity of a public servant as he was empowered by s. 95, Criminal Procedure Code, to receive the property to prevent the commission of an offence, i.e., theft by other persons taking advantage of the illness or death of the traveller[6]. A clerk in a record room made over a document forming part of a record in his custody to a person who was entitled to the document, but would otherwise have had to present an application on stamped paper in order to secure its return in a legal manner. It was held that the clerk was, under the above circumstances, rightly convicted under this section[7]. The accused, a petty officer in the Salt Department, was empowered to sell salt at reduced prices to fish-curers. He was directed to enter the sales to such persons by departmental orders in the Government books. He really bought some salt for himself at the reduced rates, entering the sales in the Government books as if made to fish-curers and thereby appropriated to himself the difference between the reduced price and the proper price. It was held that the accused was guilty under this section and not under s. 177, as he was not 'legally bound' to obey the departmental rule[8]. A post-master whose duty it was to pay over to the holders of certain cash certificates the money due thereon at a certain rate, in fact paid the holders at a lower rate and appropriated the difference himself. It was held that by so doing he had committed an offence under this section[9]. Where a public servant was entrusted with money to purchase some materials for building a house and he by some private arrangement obtained the same free of cost, it was held that a trust having been reposed in the accused as a public servant it was his duty to account truly for all the monies received and that as he had obtained the materials free of cost, it was his duty to have refunded the unspent balance to Government and as he did not do so he was guilty of criminal breach of trust[10]. C, a sub-postmaster, and D, a parcel's clerk, were charged with criminal breach of trust in respect of three sums of money received for value-payable articles. The sums of money were paid to the post office and were received by D in the usual course and entered by him in the register of value-payable articles received. C had made some entries in the register of value-payable articles received and had also initialled the balance of

1 The Indian Contract Act, (IX of 1872), s. 182.
2 *Kane*, [1901] 1 K. B. 472; *Portugal* (1885) 16 Q. B. D. 487.
3 *Subdar Meeah*, (1865) 3 W. R. (Cr.) 44.
4 *Ram Dhun Dey*, (1870) 13 W.R. (Cr. R). 77:
5 *Bhula*, (1893) Cr. R. No. 2 of 1893, Unrep. Cr. C. 632.
6 *Bhag Singh*, (1876) P. R. No. 24 of 1876.
7 *Ganga Prasad*, (1904) 27 All. 260.
8 *Balayya*, (1894) 1 Weir 467.
9 *Sita Ram*, (1919) 42 All. 204.
10 *Saiyid Mohiuddin*, (1925) 4 Pat. 488.

articles undisposed of. Under the rules the accused were bound to send money received for value-pay [illegible] latest on the next da[illegible] money received by D[illegible] post office. It was he[illegible] [illegible] his care, and [illegible]

Where a public servant was required [illegible] any Government money in excess of that shown due to Government by the registers in his hands and the public servant removed the excess from the office cash box, it was held that he was guilty of misappropriation and it made no difference that he *removed it to a godown belonging to Government, he being not entitled to retain* it pending scrutiny of the accounts[2].

The accused, a sub-postmaster, received a value payable letter to be delivered to a person on payment of the value payable amount He handed over the letter to that person without getting payment on or before October 20, *1925, and then altered his accounts so as to make it appear that he only handed* over the letter on October 24, 1925 It was held that the accused had been guilty of criminal breach of trust and falsification of accounts[3].

Director.—Where the directors of a bank paid the dividends out of the deposits, when there were no profits, thereby causing gain to persons to which they were not entitled, and wrongful loss to depositors, they were held guilty under this section[4]. The mere passing of an incorrect balance sheet is held not to amount to an offence under this section[5]. The accused, the managing director of a bank, *wishing the bank to make a better show than the real facts of its working would* warrant, in order to maintain the confidence of the shareholders and the public and so to make possible a project for increasing largely the bank's capital, on December 17, 1912, got his son to present a pro-note for Rs 3,000 as a *pro tanto* addition to the profits for 1912, by reducing on paper to that extent his remuner- [illegible] of six per cent instead of some three per cent which [illegible] the other shareholders to the extent of the enhanced dividend and so acted dishonestly[6].

[illegible] or manager of a temple appointed by a committee under Act XX of 1863 is not in the position of a clerk or servant removable at the pleasure of the *committee, and his possession of the temple and its properties is not possession of the committee.* The property of the temple is not vested in the committee, nor do they represent it. The deity is the owner of the property and the trustee is the agent of the deity subject to the committee's control. Therefore,

1 *Chandra Prasad*, (1926) 5 Pat. 578.
2 *Daya Shankar*, (1926) 1 Luck. 345.
3 *V. Kandasami Ayyar*, (1926) 52 M. L. J. 703, 38 M. L. T. 318, 25 L. W. 656.
4 *Moss*, (1893) 16 [illegible]
5 *Seddon v. Locke*, [illegible] 3 M. L. T. 21
6 *Daulat Rai*, [illegible] 28 [illegible] See *Morgal Sen*, [illegible]

if such trustee or manager misappropriates temple jewels, he is not guilty of theft but of the offence of criminal breach of trust by an agent punishable under this section[1].

Not guilty—Public servant.—A certain consignment of rice lay unclaimed at the docks and was advertised for sale by auction by the Port Commissioners. But the rice was found to be in a rotten condition and was ordered to be destroyed by the Head Department of the Corporation of Calcutta. It was entrusted for the purpose of destruction to the accused, who were Inspectors in that Department; but they sold the same to a third party and retained the proceeds of such sale. It was held that they had committed no offence under the Code, though they might have been guilty of infringing a departmental rule[2]. Where the accused in his capacity of Revenue Patel received from the Government treasury small sums of money on account of certain temple allowances, and did not at once pay over the same to the persons entitled to receive them, as he was bound to do, but it appeared that such persons were willing to trust him, and had actually passed receipts which the accused forwarded to the revenue authorities, it was held that the accused fulfilled the trust reposed in him by Government and that his mere retention of money for a time, in the absence of any evidence of dishonesty, did not amount to criminal breach of trust[3]. Where a village shroff, whose duty it was to assist in collecting the public revenue, received grains from ryots and gave receipts as if for money received by virtue of a private arrangement, it was held that he was not guilty of this offence as he was not authorized to receive the public revenue in kind and the party who delivered the grain did not thereby discharge himself from liability for the revenue[4]. The accused, a *karnam* of a Government village, received moneys from certain ryots of the village as revenue due on unassessed lands, part of which was cultivated by the ryots without leave, and as cost of boundary stones required for the said lands, and misappropriated the moneys so received to his own use. It was held that the accused was not guilty of the offence of criminal breach of trust by a public servant under this section or of cheating under s. 417[5]. The accused, the *nazir* of the Court of the Cantonment Magistrate, was convicted of having criminally misappropriated Rs. 52-6-3 out of the Government money in his charge. It appeared that he intended to restore this money to Government. It was also found that the accounts in the books were kept all right and there appeared to have been a practice of long standing in the office among officials employed to receive advances of moneys out of the cash with the accused according to their requirements, generally out of mutual regard, and then to repay them when the salaries were drawn from the Treasury and that the accused had made advances when deficiency was found in the cash. The accused made good the deficiency when he was ordered by the Cantonment Magistrate to refund it. It was held that the accused was not guilty of this offence, as there was no dishonest misappropriation or conversion or use within the meaning of s. 405[6].

Where an Assistant Station Master whose duty it was to issue tickets to the passengers and to charge fares as fixed by the railway made an overcharge over some of the tickets and did not credit the excess so realized to the railway, it was held that he was not guilty of criminal breach of trust as he was not a trustee within the meaning of s. 405[7]. The accused who was a Vice-President of a Municipality had received certain commission from a firm on the purchase of certain goods made by the Municipality. The commission was paid to him personally. It was held that there being no trust, the accused was not guilty of an offence under this section[8].

1 *Muthusami Pillai,* (1895) 1 Weir 433.
2 *Wilkinson,* (1898) 3 C. W. N. 216.
3 *Ganpat Tapidas,* (1885) 10 Bom. 256.
4 (1869) 4 M. H. C. App. 32.
5 *Rangasawmi Ayyangar,* (1888) 1 Weir 466.
6 *Imam Din,* (1902) P. L. R. No. 39 of 1902.
7 *Kudrat Nath,* (1922) 6 L. L. J. 125.
8 *U. Maung Gale,* (1926) 4 Ran. 128.

PRACTICE.

Evidence.—Prove (1) that the accused was either a public servant or a banker, or a merchant, or a factor, or a broker, or an attorney, or an agent.

(2) That he was in such capacity entrusted with the property in question or with dominion over it.

(3) That he committed criminal breach of trust in respect of it[1].

Distinct proof of criminal misappropriation is necessary[2]. But it does not lie on the prosecution to prove the actual mode of misappropriation. Where it is proved by the prosecution that the money was not returned by accused which he was bound to do, it lies on the accused to prove his defence[3]

All the necessary elements constituting the offence must be strictly proved, and when the charge is that something was substituted in place of another, there must be clear evidence that the thing alleged to have been extracted was actually there when it came under the dominion of the accused[4].

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Place of trial.—The complainant who resided at Lyallpur appointed the accused his agent for sale of certain commodities at Najibabad and sent him goods in pursuance of that contract The accused sold the goods and misappropriated the sale proceeds It was held that the Court at Najibabad was only competent to entertain the complaint and not that at Lyallpur[5].

Punishment.—Criminal breach of trust by a person in charge of public moneys calls for a severe sentence[6]

Charge.—See s. 408.

In a charge of criminal misappropriation there were three counts Each count specified the sum of money alleged to have been misappropriated by the accused on a particular day; but in two out of the three cases the total sum con- It was held that a charge so framed dure Code[7] An accused person was three distinct sums, and one charge was drawn up specifying all the three sums and the persons from whom he collected them. He was not charged with three offences, but with one offence under this section, and was convicted of one offence and sentenced to one term of imprisonment. itrary to law, it being in accordai of Criminal Procedure[8]. Where t 477A and three offences under this section, and tried and convicted, it was held that the trial was void by reason of misjoinder of charges[9]. Where the amount composed of four different sums payable in respect of four different holdings, was realised at the same time and for which one receipt was originally granted by the accused for the whole amount, it was held that it could not be said that there were four different items in respect of which he was charged and one single charge regarding the whole amount did not contravene the provisions of s. 234 of the Code of Criminal Procedure. The accused was charged under s. 222 (2) of the Code of Criminal Procedure for misappropriating a certain amount between April 1923 and March 31, 1924 In ascertaining the amount misappropriated, the Court had to go into

1 *Vide* s. 406, sup.

2 *Brinladhur Patnaik*, (1866) 5 W. R. (Cr.) 21.

3 *Kadir Bakhsh*, (1910) 8 A. L. J. 88.

4 *Singleton*, (1924) 29 C. W. N. 260.

5 *Durga Parsad*, (1927) 29 Cr. L. J. 453; *Gobindram Jashanmal*, (1927) 28 Cr. L. J. 1033.

6 *Purna Nand*, (1927) 29 Cr. L. J. 1.

7 *Ishtiaq Ahmad*, (1904) 27 All. 69.

8 *Sat Narain Tewari*, (1905) 32 Cal. 1085. See *Kashinath Dayaji Sali*, (1910) 12 Bom L. R. 226.

9 *Raman Behary Das*, (1913) 18 C. W. N. 1152; *Manant*, (1925) 27 Bom. L. R. 1343, 8 Bom. Cr. C. 108.

details and found the different dates on which the different amounts came into his hands. The Court found that on some dates certain sums were realised by him and that between some other dates certain other sums were realised by him. The method adopted by the Court was to facilitate the calculation of the total amount for the misappropriation of which he was charged. The accused did not realise and misappropriate different sums during different periods. It was held that the charge as framed was right, and did not contravene the provisions of s. 234 of the Code of Criminal Procedure[1].

Of the Receiving of Stolen Property.

Stolen property.

410. Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as "stolen property," whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without British India[1]. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof[2], it then ceases to be stolen property.

Dishonestly receiving stolen property.

411. Whoever dishonestly receives or retains any stolen property[1], knowing or having reason to believe the same to be stolen property[2], shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

Section 410 explains what comes under the words 'stolen property'. Things which have been stolen, extorted, or robbed, or which have been obtained by criminal misappropriation or criminal breach of trust come under the extended signification given to these words. As to the definition of 'possession', see s. 27; of 'theft', s. 378; of 'extortion', s. 383; of 'robbery', s. 390; of 'criminal misappropriation', s. 403; of 'criminal breach of trust', s. 405.

Under s. 410 it is immaterial whether the transfer is made or misappropriation or breach of trust has been committed within or without British India.

English law.—The description of 'stolen property' in s. 410 is not so wide as that of the similar provision of the Larceny Act[2], which enacts that "whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling or otherwise disposing whereof shall amount to felony, either at common law or by virtue of this Act, knowing the same to have been feloniously stolen, taken, extorted, obtained, embezzled, or disposed of, shall be guilty of felony, etc." This provision includes property obtained by cheating, whereas the definition of stolen property as given in s. 410 does not include it.

[1] *Harendra Kumar Ghosh*, (1926) 45 C. L. J. 207.
[2] 24 & 25 Vic., c. 96, s. 91.

1. 'Whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without British India'.— These words were inserted by Act VIII of 1882, s. 9. They have enlarged the scope of the term 'stolen property', and the act by which property has been stolen no longer need be an act punishable under the Code. The amendment was made in consequence of *Moorga Chetty's* case[1] which decided that bills of exchange stolen in Mauritius were not 'stolen property' so as to make the receiver at Bombay liable under s 411.

The receipt or retention must take place within British India, unless the ... s a British subject[2]. A subject ... property within that State, is ...

Where there is a dishonest retention in British India of property stolen elsewhere, it is no defence by the accused, being a foreign subject, that the property was stolen by himself, he not being liable to be tried, convicted, or punished ... into ... it he might be convicted of an offence under s 410[5] Similarly, where the accused, a subject of a Native State, committed a theft at Rajkot and brought the property to Thana, it was held that he could not be tried for theft, but he might be tried under s. 411 for retaining stolen property[6]. Two persons, B, who was not a British subject, and R, who was, were committed to the Court of Session at Jhansi, it being alleged against them that they had committed a robbery in an adjoining Native State and had brought the stolen property into British territory. It was held that though neither could be tried by the Sessions Judge of Jhansi for the robbery, B because he was not a British subject, and R because the certificate required by s. 188 of the Code of Criminal Procedure was wanting, yet both might be tried for the offence of retaining stolen property under s 411[7]

But if theft has been committed in British India and the accused is found in possession of stolen property outside British India, he cannot be tried for an ... the place where the ... stolen property was ...

As to the definition of 'British India', see s 15, *supra*

2. 'If such property subsequently comes into the possession of a person legally entitled to the possession thereof'.— If the owner of stolen property somehow resumes possession of the stolen property before its receipt by the person accused of receiving it, it ceases to be stolen property, and the accused cannot be convicted of receiving it knowing it to have-been stolen[8]. If stolen goods ...

the goods, but subsequently returned them to the thief, who was sent by the owner to sell them where he had sold others, and the thief then went to the shop of the accused and sold goods, and gave the money to the owner, it was held that the accused was not guilty of receiving stolen goods, inasmuch as they were delivered

... -idu,

[6] *Abdul Latib valad Abdul Rahman*, (1885) 10 Bom. 186.

[7] *Baldeva*, (1906) 26 A. W. N. 52.

[8] *Maheshwari Proshad Singh*, (1914) 18 C. W. N. 1178.

[9] *Villensky*, [1892] 2 Q. B. 597.

likely to be caused'. In such cases the prosecution need not prove and the Court need not find the intention as distinct from the knowledge; it is sufficient to prove or to find one or the other to have existed"[1].

"Di[illegible]

ception.

of possess[illegible]

such acquisition. Every [illegible]

possesses and continues to [illegible]

but every person who po[illegible]

retain dishonestly within the meaning of s 411. .Neither the thief nor the receiver of stolen property commits the offence of retaining such property dishonestly,... merely by continuing to keep possession of it. To constitute dishonest retention, there must have been a change in the mental element of possession,—possession always subsisting *animo et facto*—from an honest to a dishonest condition of the mind in relation to the thing possessed A simple illustration is the case of a pawnbroker who receives property in pledge honestly, and subsequently discovering it to be stolen property, notwithstanding mentally resolves to keep it for his own benefit. In the absence of any act amounting to misappropriation or conversion of the property to his own use, the pawnbroker could not be convicted under s 403 of criminal misappropriation, but he might be held to have committed the offence of dishonestly retaining under s 411"[2].

Thus a person cannot be convicted of ' [illegible]

at the time of receipt. But he is guilty of [illegible]

or has reason to believe that the property [illegible]

retention of stolen property may be complete without any guilty knowledge at the time of receipt[3]. But in order to support a conviction of dishonstly retaining stolen property, it ought to be shown that the accused, being in innocent possession of the property, acquired the knowledge that it was stolen, and thereafter retained it dishonestly[4]. A person who is proved to have dishonestly misappropriated property cannot be convicted of retaining it[5].

As to the meaning of 'dishonestly', see s. 24, *supra*

There must be dishonest receiving or retaining[6]. The removal of a birth register from the possession of an official without his consent for producing it in Court to prove the date of birth of a certain person is held to be not an offence under this section or any other[7].

Manual possession not necessary for receiving.—It is not necessary that the accused should have had manual possession of the goods; but directing a servant to dispose of them, as by pawning or otherwise, will be sufficient to support the charge. Where stolen property was brought by the thief into A's shop , A, with guilty knowledge, called her servant and directed her to take the stolen goods to the pawn office and "pawn them for the girl" (the thief), and the servant did so accordingly and brought back the money, which she handed to the thief in her mistress's presence, it was held that this amounted to a receiving by A of the stolen property, though she had never the manual possession of either the goods or the money[8] Where the consignee presented a railway receipt for certain stolen goods to the station-master, paid the freight and received formal delivery of the package from the latter, it was held that the goods had come to be not merely in the potential possession of the consignee but actually within his power and unrestricted control, though he had not removed them from the station where they

[1] Per Plowden, J., in *Muhammad*, (1889) P. R. No. 15 of 1889.

[illegible]

[5] *Shwe Thi*, (1906) 3 L. B. R. 254.

[6] *Phul Chand Dube*, [1929] Cr. C. (All) 645.

[7] *Chima*, (1914) P. W. R. (Cr) No. 19 of 1914

[8] *Miller*, (1853) 6 Cox 353 ; *Thomas Smith*, (1855) 24 L. J. (M. C.) 135.

were then lying, nor made any attempt to do so, and that he had received them within the meaning of this section[1].

If exclusive possession remain in the thief, there cannot be a conviction for receiving. A and B, two thieves, were seen to come at midnight out of a house belonging to C's father, under the following circumstances. A carried a sack containing stolen goods, B accompanied him; C preceded them, carrying a lighted candle. All three go into an adjoining stable belonging to C, and then shut the door. Policemen enter the stable and find that the sack lying on the floor tied at the mouth, and the three men standing round it as if they were bargaining: but no particular words were heard. It was held that on this evidence C could not be convicted of receiving stolen goods; inasmuch as although there was evidence of a criminal intent to receive, and of a knowledge that the goods were stolen, yet the exclusive possession of them still remained in the thieves, and therefore C had no posssession, either actual or constructive[2]. Where the accused, along with several others, was found in the house of one of them, quarrelling over the division of certain stolen property, which consisted of packages of cloth which had been cut through and were lying open in the house, it was held that the accused was in possession of the property and was guilty under this section and s. 414[3].

Though manual possession is not necessary yet proof of an actual taking into some kind of possession is necessary. A stole fowls, and sent them by coach to Birmingham, in a box, not addressed to anyone; but A made a verbal statement, when he sent them, that a person would call for them at Birmingham. B inquired for the box; it was shewn to her, and she claimed it but it was not delivered to her. It was held that B could not be properly convicted as a receiver[4].

Any profit to the receiver not necessary.—It makes no difference whether a receiver receives for the purpose of profit or advantage, or whether he does it to assist the thief[5].

False claim is not receipt.—The circumstance that a person knew that the property was not his own and yet claimed it before the Magistrate in his deposition in a case, was held to be not sufficient for his conviction[6].

Res nullius cannot be the subject of receiving.—Where a bull was let loose, as part of a religious ceremony, and was the property of no one, it was held that it could not be the subject of an offence under this section, as the original owner had surrendered all his rights as its proprietor and that it was, therefore, *nullius proprietas*[7].

Receiver is guilty though the principal is not.—Where a child committed theft and was discharged under s. 83, this fact was held to be no bar to the conviction of the person who received the stolen property from the child under this section[8].

Joint possession.—A person having joint possession with the thief may be convicted as a receiver[9].

Where property is found in a house in the possession of more persons than one, mere discovery of any stolen property in that house is not in itself sufficient to prove that the possession was of any of those persons[10]. Three bags of grain, alleged to be stolen property, were found in a room which was in the occupation of two persons, and was locked at the time of the search. Both of them were con-

1 *Shewdhar Sukul*, (1913) 40 Cal. 990.

2 *John Wiley*, (1850) 4 Cox 412. See *Muhammad Ali Shet*, (1908) 19 M. L. J. 301, 4 M. L. T. 415.

3 *Parmeshwar Dayal*, (1926) 7 P. L. T. 567.

4 *Catherine Hill*, (1849) 18 L. J. (M.C.) 199.

5 *Davis*, (1833) 6 C. & P. 177.

6 *Mutaya*, (1880) Unrep. Cr. C. 16.

7 *Bandhu*, (1885) 8 All. 51; *Nihal*, (1887) 9 All. 348; *Jamura*, (1884) 4 A. W. N. 87.

8 *Begarayi Krishna Saranu*, (1883) 6 Mad. 373.

9 *Thomas Smith*, (1855) 24 L. J. (M. C.) 135.

10 *Muhammad Ali Shet*, sup.

victed for being in possession of stolen property. It was held that looking to the nature of the stolen property, both the accused must have known that the grain was in their room, and the presumption was that they were both accomplices and in possession of the property. The Court said: "The rule as to exclusive possession is based on the principle that possession must be conscious and voluntary. When the article is so small that it might have been placed in the house by another inmate and overlooked by the accused, the accused is not in possession, for he was not conscious of the presence of the article"[1].

Joint family possession.—Where stolen property is found in a house occupied by several persons, it is not enough to shew that the property was found in the house, to convict a member of the family who might have had nothing to do with bringing or keeping it there[2]. The manager of a joint Hindu family is prima facie responsible for the illegal possession of stolen articles found in his house, unless the presumption is rebutted upon the particular facts and circumstances of the case[3]. Where the only evidence of the receiving of stolen property by a wife was that the property was found in the house where she lived with her husband, it was held that the offence was not established, because the evidence pointed to the possession of the husband rather than that of the wife[4]. The bare finding of stolen property in the house of a joint Hindu family is not such evidence of possession on the part of each of its members as would form a sufficient basis for a conviction[5] The managing member of a joint Hindu family may be convicted of retaining stolen property. If knowledge of the presence in the house of the stolen property is established against the managing member, he must, as the house master, be presumed to have been in possession of it[6]

In a house occupied by a joint family including several male and female members certain stolen property was found in a lock box, the key of which was in the possession of the wife of one of the men who, however, was not in the house. The husband was convicted under this section. It was held that it cannot be presumed that in every case of this kind the possession of the wife is *per se* the possession of the husband, and as there was nothing to connect the husband with the possession beyond the mere fact that he was the husband of the woman who had the key of the box, the conclusion that he was in possession of the property was not justified[7].

Husband and wife.—*English law.*—Upon a joint charge against husband and wife of receiving stolen goods the wife cannot properly be convicted if the husband is[8]. If the wife has voluntarily committed theft, the husband can be convicted of receiving stolen property from the wife[9]. But if the wife has received stolen goods without the control or knowledge of and apart from her husband, the husband cannot be held guilty of receiving even though he afterwards adopts his wife's receipt[10]. Bare acquiescence in the receipt of stolen property is not the adoption [illegible] A wife, in the absence of her husband, [illegible] en goods, and paid money on account o[illegible] erwards met. The latter then learnt that the goods were stolen, he had agreed on the price which he was to pay for them, and paid the balance to the thief. It was held that the husband might be convicted of receiving the goods knowing them to be stolen[12].

1 *Jumo*, (1907) 1 S. L. R. 66.

2 *Bashir Ahmad Khan*, (1919) 22 O. C. 256, 2 U. P. L R 12

3 *Musai Kamat*, (1920) 1 P. L. T. 431.

4 *De Silva*, (1873) 5 N. W. P. 120. See *Rachael Wardroper*, (1860) Bell Cr. C. 249

5 *Nirmal Das*, (1900) 22 All 445, *Sangam Lal*, (1893) 15 All. 129; *Ram Autar*, (1925) 47 All. 811.

6 *Budh Lal*, (1907) 29 All 598; *Sangam Lal*, (1893) 15 All. 129, 131.

7 *Khushi Ram*, (1922) 20 A. L. J. 1[illegible]; *Qaim Din*, (1925) 7 L. L. J. 223, 26 P. L. R. 522.

8 [illegible]

A husband and wife were jointly indicted for receiving stolen goods. There was evidence that the wife had received part of the stolen property from one of the thieves; there was no evidence that the husband was present at the time, and there was no evidence that the wife was acting under his compulsion. It was held that the wife was properly convicted of receiving stolen goods[1].

A wife, though she may have committed adultery, cannot steal her husband's goods; and therefore the adulterer, receiving from her the goods which she has taken from her husband, cannot be guilty of receiving stolen goods. The receiver, however, may be indicted for common law misdemeanour[2].

'Stolen property'.—Property into or for which the stolen property has been converted or exchanged is not stolen property[3]. Hence, money obtained upon forged money-orders[4] or an ingot obtained by melting stolen jewellery[5] is not stolen property.

2. 'Knowing or having reason to believe the same to be stolen property'.—The offence made punishable is not the receiving of stolen property from any particular person, but the receiving of such property knowing it to be stolen. "The word 'believe'...is a very much stronger word than 'suspect', and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property". "It was not sufficient (in such a case) to show that the accused was careless or that he had reason to suspect that the property was stolen, or that he did not make sufficient inquiry to ascertain whether it had been honestly acquired"[6]. A person is not guilty of this offence although at the time of receiving the property he erroneously believes it to be stolen[7]; or where the articles are not of an unusual character but are such as easily pass from hand to hand[8].

"A person must be held to have 'reason to believe' property to be stolen within the meaning of s. 411...when the circumstances are such that a reasonable man would be led by a chain of probable reasoning to the conclusion or inference that the property he was asked to deal with was stolen property, although the circumstances may fall short of carrying absolute conviction to his mind on the point"[9]. See also s. 26, *supra*, as to the meaning of 'reason to believe'.

It is immaterial whether the receiver knows or not who stole them. The section does not apply to the actual thief. The class of persons against whom it is directed is a class to whom these alternative words apply, "knowing or having reason to believe the same to be stolen property[10]". Retention of property stolen during the mutiny in 1857 was held punishable[11].

Servant receiving goods knowing them to have been stolen.—Where A, knowing that goods were stolen, directed B, his servant, to receive them into his premises, and B, in pursuance of that direction, afterwards received them in A's absence, B knowing that they had been stolen, they were jointly indicted for receiving them[12].

Amendment.—After the expression 'in respect of which' there were the words 'the offence of'. But the word 'the' was repealed by Act XII of 1891: and

1 *Mary Baines*, (1900) 19 Cox 524.
2 *Kenny*, (1877) 2 Q. B. D. 307; *Streeter*, [1900] 2 Q. B. 601.
3 *Subha Chand*, (1881) P. R. No. 39 of 1881.
4 *Monmohun Roy*, (1875) 24 W. R. (Cr.) 33.
5 *Subha Chand*, sup.
6 Per Melvill, J., in *Rango Timaji*, (1880) 6 Bom. 402, 403, followed in *Kaniappa Naicker*, [1913] M. W. N. 696; *Sankara Narayan Chetti*, (1916) 17 Cr. L. J. 312; *Muhammad Ibrahim*, (191,) 17 Cr. L. J. 25: *Abdur Rahim*, (1926) 27 Cr. L. J. 1144; *Suraj Prasad*, (1929) 6 O. W. N. 208.
7 *Issup*, (1888) Cr. R. No. 41 of 1888, Unrep. Cr. C. 389.
8 *Ravaji*, (1892) Cr. R. No. 13 of 1892, Unrep. Cr. C. 594; *Mowlabux*, (1910) 4 S. L. R. 159.
9 Per Rattigan, J., in *Gulbad Shah*, (1888) P. R. No. 37 of 1888, p. 95.
10 *Johri*, (1901) 23 All. 266.
11 *Sita Ram*, (1891) 1 O. D. 301.
12 *Parr*, (1841) 2 Mood & Rob. 346.

the words 'offence of', by Act VIII of 1882, s. 9, as a result of the decision in *Moorga Chetty's* case[1].

The words 'whether the transfer, etc., British India' were, as heretofore said, inserted by Act VIII of 1882, s. 9.

PRACTICE.

Evidence.—Prove (1) That the property in question is stolen property[2].

The goods received must be the identical goods which were stolen, and not something for which they had been sold or exchanged[3]. The finding must be that the accused received the very property stolen, not property like it[4]. If it is manifestly impossible to recognize stolen property no conviction could be made[5].

Where the stolen property consisted of cereals, the fact that cereals found in the house of a person residing in the same village corresponded with the alleged stolen cereals was held to be not sufficient to establish the identity of the stolen cereals with those found[6].

(2) That the accused received or retained such property.

There must be some proof that some person other than the accused had possession of the property before the accused got possession of it[7].

Where property sufficiently identified to be the property of one person is found to be in the possession of another person without leave or license or any legal permission of the owner, it is for the party in whose possession the property is found duly to account for its possession, and, unless he can do so, a jury might fairly infer in such circumstances that it was with a guilty knowledge that the accused took that which he knew to be not his own[8]. But possession of property which has been stolen from the owner is generally at best only evidence of theft when the date of the theft is so recent as to make it reasonable to presume, in the absence of explanation, that the person in whose possession the property is found must have obtained the possession by stealing[9]. Mere recent possession of stolen property is not alone sufficient, as such possession is in general evidence of stealing and not of receiving[10]. The possession of stolen goods by the accused must be possession soon after the theft or the stolen goods must have been 'recently' stolen[11]. Possession of stolen goods a few months after theft raises no presumption that the possessor knew or had reason to believe the goods to be stolen[12]. If the possession is not a recent possession the accused ought not to be called upon to explain how his possession was acquired The question of what is, or what is not, recent possession is to be considered with reference to the nature of the article stolen[13]. Whether a presumption of theft or of receipt of stolen property should be drawn would depend on the circumstances, the length of time that has elapsed after the theft, how much of stolen property is found in the possession of the person in question, the circumstances which led to the recovery and other facts connected with the discovery of the property[14]. It is a presumption of fact, and not an

1 (1881) 5 Bom. 338, F. B.

2 *Buldeo Pershad*, (1870) 2 N. W. P 187, *Ishan Chandra Chandra*, (1893) 21 Cal. 328; *Berle*, (1884) 6 All. 224; *Mabiya*, (1888) Unrep C C 116.

3 *Subha Chand*, (1881) P. R. No 39 of 1881.

4 *Bara Chela*, (1886) Cr. R. of 1868, Unrep Cr. C 227

5 *Lal*, (1912) P. L. R. No. 394 of 1912, P. W R. (Cr) No 35 of 1912.

6 *Shaikh Sharafat*, (1920) 1 P. L. T. 727.

7 *Ishan Muchi*, (1888) 15 Cal. 511; *Shir-* [illegible]

Ramjoy Kumolar, (1876) 25 W. R. (Cr.) 10 [illegible]

[illegible]

12 *Alia*, (1924) 1 Lah. C. 471.

13 [illegible] *Ramji*, [illegible]

14 *Gorle Kandangadu*, [1912] M. W. N. 97.

implication of law, from evidence of recent possession of stolen property unaccounted for, whether the offence of stealing, or of receiving, has been committed. Where the accused was found in the recent possession of some stolen sheep, of which he could give no satisfactory account, and it might reasonably be inferred from the circumstances that he did not steal them himself, it was held there was evidence for the jury that he received them knowing them to have been stolen[1]. Where a stolen horse was found in the possession of the accused six months after it was lost, and there was no other evidence against the accused, the accused was not called upon for his defence as the possession was not sufficiently recent[2]. Some bullocks were stolen, and one of them was discovered in the house of the accused fifteen months after the theft. It was held that in view of this long lapse of time between the theft and the discovery of the stolen property, the onus of proving innocent possession should not have been cast on the accused. The fact that the accused when asked to explain his possession of the animal gave an explanation which was not satisfactory was not a sufficient ground for his conviction[3]. Where ordinary keys of the value of Rs. 2-8-0 were found in the possession of a man of substance more than three months after the theft, it was held that having regard to the length of time there was no presumption that the accused knew or had reason to believe the property to be stolen[4]. Where the accused was found in possession of stolen property two months after the theft was committed, and gave no account of how he became possessed of it, but denied that he was ever in possession of any of the articles stolen, it was held that the accused should be convicted under this section and not under s. 379[5]. Where valuable jewellery which was stolen or otherwise lost to the owner was found under circumstances of grave suspicion in the possession of the accused about two years after the theft or loss, and the accused refused to disclose the name of the person from whom he received the same or to give the particulars as to the original of his possession, the Court drew an inference of guilty knowledge on the part of the accused[6]. Where the accused, the father-in-law of one S, who was the cousin of the thief, was found in possession of the stolen property three days after the theft and he disposed of it in a somewhat suspicious manner, it was held that the circumstances, though they formed grounds for grave suspicion against the accused, did not furnish conclusive evidence against him for his conviction under this section.[7] Lapse of time after the article was stolen is usually an important factor in determining the guilt of the accused, but the importance to be attached to it must vary with the circumstances of the individual case and will depend largely on the frequency with which the property is likely to have changed hands. No maximum period can be suggested as that beyond which no inference of guilt can be drawn[8]. There can be no hard and fast rule as to time 'when an accused person should not be called upon to explain the possession of ordinary articles found with him after the commission of the dacoity at which they were stolen. Two and a half months after a dacoity is, however, not a long time and where such articles are recovered two and a half months after the dacoity it cannot be presumed that the accused had no guilty knowledge[9].

[1] *Langmead*, (1864) 9 Cox 464; *McMahon*, (1875) 13 Cox 275.

[2] *Cooper*, (1852) 3 C. & K. 318. See, to the same effect, *Ram Chandra Saha* v. *Haji Meah Haji Abdullah*, (1913) 17 C. W. N. 1129, where the Court refused even to issue process against a shroff in whose possession a Government currency-note of the value of Rs. 1,000 was traced seven months after its loss. See also *Vellai Ocha Thevan*, [1912] M. W. N. 362, 11 M. L. T. 186; *Mangaya Shah*, (1915) P. W.R. (Cr.) No. 41 of 1915, P. L. R. No. 62 of 1915; *Muthu Veera Velan*, (1928) 30 Cr. L. J. 542 [1929] M. W. N. 517.

[3] *Narain Singh*, (1928) 29 P. L. R. 441.

[4] *Joeenullah Bepari*, (1918) 22 C. W. N. 597.

[5] *Madappa Thevan*, (1888) 1 Weir 471.

[6] *Ram Pershad*, (1924) 2 Ran. 80.

[7] *Asvini Kumar Roy*, (1905) 10 C. W. N. 219.

[8] *Smith*, (1917) 19 Cr. L. J. 189.

[9] *Jwala*, (1927) 1 Luc. C. 163.

Recognition of things not before the eyes of deposing witnesses is not evidence against a person accused of having been in possession of those things[1].

(3) That he did so dishonestly[2]. Where a person is found in possession of stolen property dishonest retention on his part must be proved. The mere fact that his conduct is suspicious is not sufficient to repose a conviction upon[3]. The onus is on the prosecution to prove that the accused received the property dishonestly, and not on the accused to show that he received it honestly[4].

In considering whether the possession of stolen goods raises a presumption of dishonest receipt of stolen property, possession should be clearly traced to the accused[5].

(4) That he knew or had reason to believe that the property was stolen property[6].

As to the proof of the receiver's guilty knowledge, from the caution necessary in this sort of traffic, it must often happen that no express disclosure is made to him and yet that he knows the property to have been stolen as well as if he had actually witnessed the theft In this, as in other cases, it is sufficient if circumstances are proved, which, to persons of ordinary understanding in the situation of the accused person, must have led to the conclusion that the property was stolen or otherwise dishonestly acquired Thus, if it is shewn, that the accused received large quantities of money, ornaments, bundles of clothes of various kinds or moveables of any sort from persons destitute of property and without any apparent lawful means of acquiring it, and especially if it is proved that the property was brought at untimely hours and under circumstances of evident concealment, it may well be concluded that it was received with a full understanding of the guilty mode by which it has been acquired And this will be still further confirmed, if it appears that the property was purchased for a sum far below its real value, or was concealed in places not usually employed for keeping such property, or if the marks on it are effaced, or if false or inconsistent stories are told as to the mode of its acquisition Another circumstance from which such guilty knowledge may be inferred is that the property has been received from a notorious thief or one from whom stolen property has on previous occasions been received[7] Where a question of value of the property stolen is to arise there must be direct evidence of value[8].

Where the circumstances do not raise the presumption that a person received the property knowing it to be stolen, the accused cannot be convicted of this offence merely because he is in possession of the property and does not account for his possession[9]. The Court must be satisfied that the property was stolen by some other person to the knowledge of the accused and there should be some evidence to shew that such was the case[10]. The stealing by the other person must be proved, otherwise the receiver must be acquitted[11].

The mere fact that a person points out a place where stolen property is concealed, if the place is not his own, is not sufficient to entitle the Court to find that the person who pointed it out had received it, or retained it, knowing it to be stolen. There must be some evidence which suggests that the accused himself concealed the article in the place where it was found[12].

[1] *Mussummut Joomnee*, (1867) 8 W. R. (Cr) 16.
[2] *Burke*, (1884) 6 All. 224
[3] *Ghansham Das*, (1925) 26 P. L. R 165.
[4] *Kartar Singh*, (1928) 10 L. L. J. 316.
[5] *Malhari*, (1882) 6 Bom. 731.
[6] *Doyal Shikdar*, (1866) 6 W. R (Cr.) 87; *Meer Yar Ali*, (1870) 13 W R (Cr) 70; *Dussorut Dass*, (1872) 18 W. R (Cr.) 63; *Bijo Hari*, (1873) 19 W. R. (Cr) 37.
[7] M & M. 373
[8] *Mahboob*, (1920) 2 U. P. L. R. 113
[9] *Burke*, sup.; *Bharos*, (1923) 21 A. L. J. 836;

A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article. The fact that at the same time he was in possession of many other stolen articles is relevant, as tending to shew that he knew each and all of the articles, of which he was in possession, to be stolen[1]. The fact of stolen property being found concealed in a man's house would be sufficient to raise a presumption that he knew the property to be stolen property, but it would not be sufficient to shew that it had been acquired by dacoity[2], or some such other offence.

On an indictment against A for stealing, and B for receiving stolen goods, evidence was given that on various former occasions portions of the commodity stolen had been missed, and the accused had, after such occasions, been found selling such commodity; and that on the last occasion it was part of what was stolen. It was held that this was sufficient to fix the receiver with a guilty knowledge[3].

Upon the trial of an accused person for feloniously receiving stolen property, a list of the stolen articles which the accused, who was a marine store-dealer, had brought, was received in evidence in order to shew that he had bought at an under-value. The circumstances under which the list was written were as follows: A police constable asked the accused to consider when he had bought the stolen property, to which the accused replied that his wife should make out a list of it, and on the next day the accused's wife in her husband's hearing said, "this is a list of what we bought and what we gave for them". On the question whether the list was properly admitted in evidence, it was held that it was clearly admissible in evidence[4].

A principal felon is a competent witness against an accessory for receiving stolen property[5]. An admission of his guilt, made by the thief while in custody, in the presence of the receiver, is evidence against the receiver[6]. But it is unsafe to convict a party as receiver on the evidence of the thief, unless it is confirmed[7]. The mere fact that stolen goods were found on the accused's premises is not sufficient to confirm the evidence of the thief[8].

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class—Triable summarily if the property is not worth more than Rs. 50.

A Magistrate cannot assume jurisdiction to try an offence under this section, in a summary form, unless he satisfies himself that the property in respect of which he is trying the accused is less than Rs. 50 in value, and he must record the fact in the form prescribed in s. 263 of the Criminal Procedure Code. Where there is no such reference in the record of the case, the conviction is bad[9].

Venue.—A charge of receiving or retaining stolen goods may be inquired into or tried either by the Court within the local limits of whose jurisdiction the goods were stolen, or by any Court within the local limits of whose jurisdiction any of them were at any time dishonestly received or retained[10].

Property belonging to different owners.—Where a person was found in possession of stolen property, identified as belonging to different owners, but it did appear that he had received such property at different times, it was held that such person could not properly be tried and convicted under this section separately in respect of the property identified by each owner[11]. The onus in such a case lies on the

1 Illustration (*a*) to s. 14, Indian Evidence Act.
2 *Malhari*, (1882) 6 Bom. 731.
3 *William Nicholls*, (1858) 1 F. & F. 51.
4 *Mallory*, (1884) 3 Q. B. D. 33.
5 *William Haslam*, (1876) 1 Leach 418.
6 *Moulton Cox*, (1885) 1 F. & F. 90.
7 *Robinson*, (1864) 4 F. & F. 43.
8 *Pratt*, (1865) 4 F. & F. 315.
9 *Brij Nandan Panday*, (1922) 6 P. L. T. 114.
10 Criminal Procedure Code, s. 180, ill. (*b*).
11 *Makhan*, (1893) 15 All. 317; *Sheo Charan*, (1923) 45 All. 485; *Ganesh Sahu*, (1923) 50 Cal. 594; *Maiku*, (1890) O. S. C. 167, 1 O. D. 252; *Munwa*, (1923) 26 Cr. L. J. 1.

prosecution to establish that the property was received by the accused at different times, and it is not for the accused to prove that he had received the same at one time[1].

Separate trials in respect of different items of stolen property.—In the house belonging to two brothers, three items of stolen property were discovered, namely, a quantity of unused postage stamps, some carpets, and some buckets and padlocks There was no evidence to shew that the stamps and carpets had been received by the brothers on different dates. On a charge of dishonestly retaining the carpets, one brother was acquitted and the other convicted. Proceedings against them were also instituted in respect of dishonest retention of the stamps. The accused pleaded that as the stamps had been discovered at their house on the same date and at the same place as the carpets, only one offence in respect of these two items of property had been committed and that as they had already been tried in respect of the carpets they could not be tried in respect of the stamps. It was held that they could not be so tried[2]. Where the property stolen formed the contents of a single parcel, a single offence in respect of all the articles contained in the parcel and not separate offences in respect of the different articles should be treated as the basis of the conviction[3].

A person committing theft or breach of trust is not liable as a receiver.—A person cannot be convicted under this section in respect of property for which he himself has been convicted[4] The theft and taking and retention of stolen goods forms one and the same offence, and cannot be punished separately[5]. When the chief offence charged and proved by the evidence is theft, the fact of the stolen property being found in the possession of the offender should be considered as a portion of the evidence by which the chief offence is proved, and the verdict of 'not guilty' should be entered upon the charge of dishonestly receiving or retaining such property[6].

Direction to jury.—It is no misdirection for a Judge to tell the jury that, if the accused could not prove how he became possessed of certain articles, it was their duty to convict him, for the presumption in such a case was legally valid that he knew that the property had been unlawfully acquired[7] The Sessions Judge should direct the jury to find (1) whether the property was stolen, (2) whether it was dishonestly retained, and (3) whether the accused knew or had reason to believe the same to be stolen property[8].

Charge.—The charge should state that the articles found in possession of the accused were the property of a certain person, who was the owner thereof[9]. It should also set forth that the accused knew or had reason to believe that the property he received was stolen property, for without this knowledge or belief, the off[illegible][10]

[illegible] *etc*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, dishonestly received (*or* retained) stolen property, to wit——belonging to one AB, knowing or having [illegible] committed [illegible] [illegible]y cogni- [illegible]

[illegible]

5 [illegible]
6 [illegible]
7 [illegible]
8 [illegible]
9 [illegible] 95.
10 [illegible]

And I hereby direct that you be tried by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—In general a sentence of fine in the case of a receiver of stolen property is an improper and a futile sentence, inasmuch as the fine is a mere temporary diminution of the receiver's illegitimate profits[1].

Dishonestly receiving property stolen in the commission of a dacoity.

412. Whoever dishonestly[1] receives or retains[2] any stolen property[3], the possession[4] whereof he knows or has reason to believe[5] to have been transferred by the commission of dacoity[6], or dishonestly receives from a person, whom he knows or has reason to believe to belong or to have belonged to a gang of dacoits, property which he knows or has reason to believe to have been stolen, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

The object of this section is to stamp out the offence of dacoity which was very common when the Code was enacted.

This section refers to persons other than the actual dacoits. It implies receipt from another person or an act by one not himself the dacoit[2]. The receiver is punishable under it as severely as those who commit dacoity.

1. **'Dishonestly'.**—See s. 24, *supra*.

2. **'Receives or retains'.**—See s. 411, *supra*. Such receipt or retention must have taken place in British India to give jurisdiction to Courts. Certain persons, who were not proved to be British subjects, were found in possession, in a Native State, of property, the subject of a dacoity committed in British India. They were not proved to have taken part in the dacoity, and there was no evidence that they had received or retained any stolen property in British India. They were convicted of offences punishable under this section. It was held that no offence was proved to have been committed within the jurisdiction of a British Court[3].

3. **'Stolen property'.**—See s. 410, *supra*.

4. **'Possession'.**—See s. 27, *supra*.

5. **'Reason to believe'.**—See s. 26, *supra*.

6. **'Dacoity'.**—See s. 391, *supra*.

PRACTICE.

Evidence.—Prove (1) that the property in question was stolen property[4].

(2) That the possession of such property was transferred by the commission of dacoity.

(3) That the accused received or retained such stolen property.

(4) That he did as in (3) dishonestly[5].

(5) That he knew or had reason to believe the circumstances stated in (2)[6].

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1 Per Batchelor, J., in *Isarising*, Cr. Reference No. 97 of 1915, decided on November 16, 1915. (Unrep. Bom.)

2 *Bahiru*, (1886) Unrep. Cr. C. 312, Cr. R. No. 65 of 1886.

3 *Kirpal Singh*, (1887) 9 All. 523; *Muhammad Hussain*, (1920) 2 L. L. J. 348; *Gunna*, (1926) 48 All. 687.

4 *Vide* s. 410, sup.

5 *Vide* s. 24, sup.

6 *Jogeshur Bagdee*, (1867) 7 W. R. (Cr.) 73 [109]; *Bishoo Manjee*, (1868) 9 W. R. (Cr.) 16; *Samiruddin*, (1872) 18 W. R. (Cr.) 25; *Daji Mahadhu*, (1895) Cr. R. No. 19 of 1895, Unrep. Cr. C. 756.

Or prove (1) that the property in question was stolen property.

(2) That the accused received it.

(3) That he received it from a person who belonged to or had belonged to a gang of dacoits.

(4) That he did as in (3) dishonestly.

(5) That he knew or had reason to believe that the person from whom he received the property belonged to or had belonged to a gang of dacoits.

(6) That he knew or had reason to believe that the property was stolen property.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—

[illegible]

with part of the plun-
with the dacoity as
ought to be charged
[illegible] in the possession of dacoits the offence of 'knowingly having it in possession' is to be considered included in the original one of dacoity, unless there are circumstances clearly separating the crime from the other, e g., length of time or distance[2] Separate convictions and sentences under ss 395 and this section with respect to the same property are, therefore, obviously improper[3].

Sentence.—A sentence of transportation under this section and s 59 cannot exceed ten years[4].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, dishonestly received [*or* retained] stolen property, to wit——, belonging to one AB, knowing or having reason to believe that the possession of the same had been transferred by the commission of dacoity; and thereby committed an offence punishable under s. 412 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Habitually dealing in stolen property.

413. Whoever habitually receives or deals in property which he knows or has reason to believe to be stolen property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section punishes severely the common receiver or professional dealer in tolen property. One who casually receives stolen property is punished under the

[illegible]

different thieves on the same day[5]. Because "the very essence of the offence is...the

[1] *Motee Jolaha*, (1863) 5 W. R. (Cr.) 66; *Casey Mul*, (1865) 3 W. R. (Cr.) 10
[2] *Abool Hossein*, (1864) 1 W. R. (Cr.) 48; *Shahabut Sheikh*, (1870) 13 W. R. (Cr.) 42.
[3] *Bihiru*, (1886) Cr. R. No. 65 of 1886, Unrep. Cr. C. 312.
[4] *Mohanundo Bhundary*, (1866) 5 W. R. (Cr.) 16.
[5] *Baburam Kantari*, (1891) 19 Cal. 190.

habitual, that is to say, constant receipt of or dealing in goods which the accused knew or had reason to believe to be stolen"[1].

PRACTICE.

Evidence.—Prove (1) that the property in question is stolen property.

(2) That the accused received it or dealt in it.

(3) That he did so habitually.

(4) That he did so knowing or having reason to believe it to be stolen property.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Trial for an offence under ss. 411 and 413.—An accused person cannot be tried at the same trial for receiving or retaining (s. 411), and habitually receiving or dealing in (s. 413) stolen property. The proper course is to try the accused first for the offence under s. 411, and, if he is convicted, to try him under s. 413, putting in evidence the previous conviction under s. 411, and proving the finding of the rest of the property in respect of which no separate charge under s. 411 could be made or tried by reason of the provisions of s. 453 of the Criminal Procedure Code[2].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, were a habitual receiver or dealer in property, which you knew (*or* had reason to believe) to be stolen property and that you thereby committed an offence punishable under s. 413 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Assisting in concealment of stolen property.

414. Whoever voluntarily assists in concealing or disposing of or making away with property[1] which he knows or has reason to believe to be stolen property[2], shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

This section punishes those acts of receiving or retaining stolen property which do not come under the purview of ss. 411, 412 and 413.

Scope.—This section is intended to apply to cases where there has not been such a possession as would support an indictment against the party, as a receiver, under s. 411. "When a person is shown to stand in such a relation to stolen property as falls short of possession by him of such property, his manner of dealing with the property may warrant a charge of assisting in concealing or disposing of or making away with the property, with a guilty knowledge"[3]. The Bombay High Court in a case held that the section applied only where there was no actual receipt of the property[4]. But subsequently it has dissented from this view and has held that a person receiving stolen articles could be convicted of concealing or disposing of them[5].

[1] Per Norris and Beverley, JJ., in *Baburam Kansari,* (1891) 19 Cal. 190, 199.

[2] *Uttom Koondoo,* (1882) 8 Cal. 634.

[3] Per Plowden, J., in *Khona,* (1879) P. R. No. 31 of 1879, p. 84.

[4] *Alu Kala,* (1891) Unrep. Cr. C. 553, Cr. R. No. 28 of 1891; (1868) 4 M. H. C. App. 13; *Subba Chand,* (1881) P. R. No. 39 of 1881.

[5] *Abdul Gani,* (1925) 27 Bom. L. R. 1374, 8 Bom. Cr. C. 139.

Ingredients.—This section requires two things—

1. Voluntary assistance in concealing or disposing of or making away with property.

2. Knowledge or reason to believe that such property is stolen property.

1. 'Voluntarily assists in concealing or disposing of. .property'.—The words 'disposing of' must be interpreted in the light of the words they are associated with, viz., 'concealing' and 'making away with' and cannot be taken to include restoring to the owners. Where the accused was convicted of having voluntarily assisted in concealing stolen railway pins in a certain person's house and field, with a view to having such innocent person punished as an offender, it was held that the Magistrate was right in convicting and punishing the accused for the two separate offences of fabricating false evidence for use in a stage of a judicial proceeding under s 193, and of voluntarily assisting in concealing stolen property under this section[1]. Where the accused was found to have restored to the owners jewellery believed to have been stolen by his son, and then to save his son from punishment denied all knowledge of the matter, and on this ground was convicted under this section, it was held that the accused had committed no offence[2].

As to the meaning of 'voluntarily', see s 39, *supra*

2. 'Knows or has reason to believe to be stolen property'.—The person voluntarily assisting in concealing or disposing of or making away with property must have a definite knowledge that such property was stolen property.

"The word 'believe' . is a very much stronger word than 'suspect', and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property" "It was not sufficient (in such a case) to show that the accused was careless or that he had reason to suspect that the property was stolen, or that he did not make sufficient inquiry to ascertain whether it had been honestly acquired"[3]. See also s. 26, *supra*, as to the meaning of 'reason to believe'.

It is not necessary to establish that the property was the subject-matter of any particular theft; but it must be shown that it was the subject-matter of some theft or other. The essence of this section is the concealment of stolen property which the accused knew or had reason to believe to be stolen property If, therefore, an accused thinking that an article, which is in his possession, is stolen property, tries to conceal that property, when as a matter of fact it is not stolen property at all but property honestly come by, he does not commit an offence under this section. The fact that the property dealt with is stolen property may in some instances be inferred indirectly from circumstantial evidence as from the way in which it is dealt with by the party dealing with it, but the circumstances must be such as would justify the conclusion that the property is actually stolen property[4].

PRACTICE.

Evidence.—Prove (1) that the property in question is stolen property[5].

(2) That the accused assisted in concealing, or disposing of, or making away with, such property.

This section does not impose on the prosecution the requirement that it should in all cases trace the owners of the property stolen All that is needed is to

show that the accused voluntarily assisted in concealing or disposing of property which he had reason to believe to be stolen property[1].

(3) That he did as in (2) voluntarily.

(4) That he knew or had reason to believe that the property was stolen property[2].

When persons are charged with assisting in concealing or disposing of property which they know or have reason to believe to be stolen, the nature of the property, as well as the circumstances under which it was being made away with, must be taken into consideration[3]. An accused person's merely pointing out the place where some of the stolen property is recovered and his making an admission before the police of having concealed it there, which admission is not admissible in evidence, are not sufficient for convicting him under this section in the absence of any other independent proof connecting him with the commission of the crime[4].

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class—Triable summarily if property is not worth more than Rs. 50.

The same person cannot be properly convicted for theft and for attempting to conceal the stolen property[5] or for theft and for dishonestly disposing of the same property[6].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, voluntarily assisted in concealing (*or* disposing of, *or* making away with) property, to wit——, which you knew (*or* had reason to believe) to be stolen property, and that you thereby committed an offence punishable under s. 414 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of (Session *or* High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Sentence.—Where an accused is convicted of an offence under ss. 411 and 414, it is not permissible to pass on him separate and consecutive sentences under each head of the charges, but in such a case only one sentence must be passed on him for both offences[7]. The charges under these sections should ordinarily be made alternatively, and not cumulatively[8].

Of Cheating.

Cheating.

415. Whoever, by deceiving any person[1], fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property[2], or intentionally[3] induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.

1 *Budhankhan Inayatkhan*, (1912) 14 Bom. L. R. 893, 1 Bom. Cr. C. 189; *Abdul Gani*, (1925) 27 Bom. L. R. 1373, 8 Bom. Cr. C. 139.

2 *Rameshar Rai*, (1877) 1 All. 370.

3 *Harishankar Fakirbhat*, (1865) 2 B. H. C. 120.

4 *Kaka Singh*, (1908) P. W. R. (Cr.) No. 21 of 1908.

5 *Zinda*, (1896) P. R. No. 15 of 1896.

6 *Nga Po Kyaw*, (1885) S. J. L. B. 334.

7 *Sakharam*, (1889) Cr. R. No. 8 of 1889, Unrep. Cr. C. 449; *Alu Kala*, (1891) Cr. R. No. 28 of 1891, Unrep. Cr. C. 553.

8 *Yeshwant*, (1908) 10 Bom. L. R. J. 125.

ILLUSTRATIONS.

(a) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.

(b) A, by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.

(c) A, by exhibiting to Z a false sample of an article, intentionally deceives Z into believing that the article corresponds with the sample, and thereby dishonestly induces Z to buy and pay for the article. A cheats.

(d) A, by tendering in payment for an article a bill on a house with which A keeps no money, and by which A expects that the bill will be dishonoured, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats

(e) A, by pledging as diamonds articles which he knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats

(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats

(g) A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery A cheats; but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

(h) A intentionally deceives Z into a belief that A has performed A's part of a contract made with Z, which he has not performed, and thereby dishonestly induces Z to pay money. A cheats

(i) A sells and conveys an estate to B. A, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z, without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or mortgage money from Z. A cheats.

COMMENT.

In all the foregoing offences relating to property the offender merely got possession of the thing in question, but in the case of cheating he obtains possession plus property in it.

The authors of the Code say: "We propose to make it cheating to obtain property by deception in all cases where the property is fraudulently obtained; that is to say, in all cases where the intention of the person who has by deceit obtained the property was to cause a distribution of property which the law pronounces to be a wrongful distribution, and in no other case whatever. However immoral a deception may be, we do not consider it as an offence against the rights of property if its object is only to cause a distribution of property which the law recognizes as rightful...

"We propose to punish as guilty of cheating a man who, by false representations, obtains a loan of money, not meaning to repay it; a man who, by false representations, obtains an advance of money, not meaning to perform the service or to deliver the article for which the advance is given; a man who, by falsely pretending to have performed work for which he was hired, obtains pay to which he is not entitled

"In all these cases there is deception. In all, the deceiver's object is fraudulent. He intends in all these cases to acquire or retain wrongful possession of that to which some other person has a better claim, and which that other person is

entitled to recover by law. In all these cases, therefore, the object has been wrongful gain, attended with wrongful loss. In all, therefore, there has, according to our definition, been cheating"[1].

"In the definition of cheating in s. 415 there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced to deliver any property to any person or to consent that any person shall retain any property. In order to constitute the offence of cheating the person who induces another to do this class of acts must fraudulently or dishonestly induce the person deceived to do that kind of act. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In order to constitute the offence of cheating with regard to this class of acts the person who induces another to do them must intentionally induce him to do them. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts the inducing must be intentional"[2].

English law.—Whosoever shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanour[3]. There are two vital points in which the English law differs from the Code:—

(1) A promise as to future conduct not intended to be kept is not by itself a cheating[4]. Under the Code this will amount to cheating: see ills. (*f*) and (*g*).

(2) The object of the accused must be to obtain any chattel, money, or valuable security. The definition of cheating as given in this section is much wider and includes damage or harm done to a person in body, mind, reputation, or property.

Scope.—The definition of cheating contains two parts. First comes the main part "whoever, by deceiving any person..." words which obviously apply to the whole section. Then comes the first part "fraudulently, or dishonestly induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property". Then comes part 2, which is an alternative to sub-part 1, viz., "or intentionally induces...mind, reputation or property". Then come the closing words "is said to cheat". The words "and which act or omission...reputation or property" form a portion of part 2 and are not applicable to part 1 at all[5]. The definition of the offence of cheating embraces some cases in which no transfer of property is occasioned by the deception and some in which such a transfer occurs; for these cases generally a general provision is made in s. 417 of the Code. For the cases in which property is transferred a more specific provisions is made by s. 420[6]. But in an earlier case it has been laid down that an offence of cheating accompanied by a delivery of property may be punished under either of the sections: but where the case appears to be of a serious nature steps must be taken to send it to the Court of Session for trial under s. 420[7].

The offence of cheating is not committed if a third party, on whom no deception has been practised, sustains pecuniary loss in consequence of the accused's act[8].

Cheating and extortion.—The offence of cheating must, like that of extortion, be committed by the wrongful obtaining of a consent. The difference is, that the extortioner obtains the consent by intimidation, and the cheat by deception[9].

1 Note N, pp. 164, 166.

2 Per Geidt, J., in *Kishori Lal Chatterji*, (1905) 9 C. W. N. 764, 767.

3 Larceny Act, 1861 (24 & 25 Vic., c. 96), s. 88.

4 62 & 63 Vic. c. 22, s. 3.

5 *Ishar Das*, (1908) P. W. R. (Cr.) No 18 of 1908.

6 *Bavaji*, (1875) Unrep. Cr. C. 96, Cr. R., September 23, 1875.

7 *Bapu*, (1864) Unrep. Cr. C. 2.

8 *Sundar Singh*, (1904) P. R. No. 25 of 1904.

9 Note N, p. 163.

Cheating and criminal breach of trust and criminal misappropriation.—Cheating differs from the last two offences in the fact that the cheat takes possession of the property by deception. There is wrongful gain or loss in both cases and in both cases there is an inducement to deliver property.

Ingredients.—This section requires—

1. *Deception of any person*
2. (*a*) Fraudulently or dishonestly inducing that person
   (i) to deliver any property to any person, or
   (ii) to consent that any person shall retain any property, or
   (*b*) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

1. 'Deceiving any person'.—It means causing to believe what is false; or misleading as to a matter of fact, or leading into error[1] The person deceived need not be a definite person to whom the false representation is made To constitute cheating there must be a deception which must precede and induce under the first part of the section, the delivery or retention of property, or act or omission referred to in the second part Such deception may be by words or conduct As to what is sufficient to constitute deception must be decided in each case on its own facts[2]

Wherever a person fraudulently represents as an existing fact that which is not an existing fact, he commits this offence A wilful misrepresentation of a definite fact with intent to defraud, cognizable by the senses—as where a seller represents the quantity of coals to be fourteen cwt whereas it is in fact only eight cwt, but so packed as to look more, or where the seller, by manœuvring, contrives to pass off tasters of cheese as if extracted from the cheese offered for sale, whereas it is not—is cheating[3].

Where a charge of cheating rests upon a representation which is impugned as false and which relates not to an existing fact but to a certain future event, it must be shown that the representation was false to the accused's knowledge at the time when it was made It is but little to the purpose to show that in fact the representation has turned out to be untrue[4].

It is not necessary that the false pretence should be made in express words, if it can be inferred from all the circumstances attending the obtaining of the property[5]. Fraudulent intent is absolutely essential An illegal demand if not fraudulent does not amount to cheating. The accused, who was the landlord of the complainant, sent for the latter, and on the latter appearing demanded payment of rent. The complainant left for home to fetch the money requesting the accused and his clerk to have in the meantime his dues worked out and have a receipt written. He returned soon with Rs. 90 and paid the same to the accused, who drove him away refusing to give a receipt or return the money unless and until Rs. 25 more were paid to make up the sum, the said amount having been deducted towards certain subscription It was held that no criminal offence was committed[6]

Where a person knows that the statements made by another are false, but still acts upon them with a view to entrap that person, it will not amount to cheat-

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1 Dr. Murray's New English Dictionary, *William Woolley*, (1850) 4 Cox 193

2 *Ramanath Kalupahar*, (1905) 2 C. L. J. 521.

3 *Thomas Goss*, (1860) 8 Cox 262.

4 *Ebrahimji Mulla Jeevanji*, (1912) 15 Bom. L. R. 297, 2 Bom Cr. C 48

5 *Maria Giles*, (1865) 10 Cox 41; *Khola Bux v. Baleyn Mundari*, (1905) 32 Cal. 941; *Ram Chand v. Jai Dial*, (1912) P. L. R. No 114 of 1912, P. W. R. (Cr.) No 10 of 1912; on rem[illegible]

6 [illegible] 515 C. [illegible] L. T. 211.

ing. Where, therefore, money was obtained by the accused by the false pretence that he had cut sixty-three fans of chaff when in fact he had only cut forty-five, and the prosecutor had previously seen the accused remove eighteen fans from an adjoining place, and add them to the heap which he pretended he had cut, but notwithstanding this knowledge he paid the accused the amount he demanded, it was held that this offence was not committed[1]. But a man may be guilty of an attempt to cheat although the person he attempts to cheat is forewarned and is therefore not cheated[2]. M wrote a letter to the Currency Office at Calcutta, enclosing the halves of two Government currency notes, stating that the other halves were lost, and enquiring what steps should be taken for the recovery of the value of the notes. The Currency Office, having, upon enquiry, discovered that the amount of the notes had been paid to the holder of the other halves, and that the notes had been withdrawn from circulation and cancelled, sent M the usual form of claim to be filled up and returned to it. It appeared from the evidence that the Currency Office never contemplated paying M in respect of the notes. The form was filled up and signed by M and returned by him to the Currency Office. It was held that although there was no intention on the part of the Currency Office to pay the amount of the notes, M was guilty of an attempt to cheat[3]. The accused described himself as the Principal of the 'British Health Institute', and issued advertisements stating that arrangements had been made for testing urine, if desired, at a nominal fee of 1s. 6d. Two individuals, who suspected the genuineness of the advertisement, forwarded to the appellant a solution of water with colouring ingredients mixed with soap, and asked for an analysis of their "water". Letters were received from the accused advising a course of treatment to cost not less than one guinea in each case. It was held that the accused was guilty of attempting to obtain money by false pretences although the persons to whom the false pretence was made knew it to be false[4].

It is immaterial whether the prosecutor has means of detecting the fraud or not.—A person who offered a £1 bank-note as a note for £5 and got it changed upon that representation was held guilty of obtaining money by false pretences, although the prosecutor might, by the exercise of reasonable caution, have detected the imposition[5]. The question in every case is, whether, in truth, the false statement did impose upon the prosecutor or not[6].

2. 'Fraudulently or dishonestly induces the person so deceived to deliver any property...or to consent that any person shall retain any property'.—The words 'fraudulently and 'dishonestly' do not govern the whole of the definition of cheating. The section is divided into two parts. Under the first part the person deceived must have been fraudulently or dishonestly induced to deliver any property to any other person, or to consent that the said other person should retain any property. The second part provides for the case of a person who by deceiving another intentionally induces the person so deceived to do an act which causes or is likely to cause damage or harm, although the deceiver has not acted fraudulently or dishonestly[7]. The evidence must establish the existence of a fraudulent or dishonest intention at the time of the commission of the act in respect of which the cheating is alleged[8]. To describe consequences of an act to be more serious than, in fact, they were likely to be, may be to deceive, but is not cheating if done *without any fraudulent or dishonest intention*. Thus, to induce a son to pay his father's debts, by acting merely on his fear of consequences to his father,

1 *Mills*, (1857) 26 L. J. (M. C.) 79, 7 Cox 263.
2 *Hensler*, (1870) 11 Cox 570; *Umesh Chunder Miller*, (1888) 16 Cal. 310.
3 *Umesh Chunder Mitter, ibid.*
4 *Light*, (1915) 24 Cox 718.
5 *Jessop*, (1858) 7 Cox 399.
6 *Woolley*, (1850) 4 Cox 193.
7 *Mohabat*, (1889) P. R. No. 20 of 1889.
8 *Viraswami*, (1881) 1 Weir 478; *Dick*, (1914) 12 A. L. J. 1258.

is not cheating[1]. A owed B a debt, of which B could not get payment C, a servant of B, went to A's wife and obtained two sacks of malt of her, saying that B had bought them of A. C knew this to be false, and took the malt to B, his master, to enable him to pay himself the debt. It was held that if C did not intend to defraud A but merely to put it into his master's power to compel A to pay him a just debt, C ought not to be convicted of obtaining the malt by false pretences[2].

A concealment of facts cannot be said to be dishonest unless the accused was under an obligation to disclose the facts concealed[3]. There is no obligation on the seller to disclose any defect unless it is a defect which the buyer could not with ordinary care discover. The existence of prior mortgage or the claims of a co-parcener of a Hindu joint-family are defects which the buyer could discover with ordinary care and the failure on the part of the seller to disclose them does not therefore amount to cheating[4].

A person who sent an insured cover, purporting to contain Government currency notes, but which, on receipt by the addressee, was found to contain only a letter advising the despatch of notes, and pieces of waste paper, was held not guilty of cheating. The Court observed: "All that the person deceived has been induced to do is that he has signed a receipt acknowledging the delivery of a cover He has not acknowledged by that the receipt of any sum of money alleged to be contained in the cover That being so, we are unable to say that the charge of cheating has been brought home to the accused"[5] In response to a serious demand by complainant for re-payment of a loan which accused had taken from him some time back, accused addressed an insured cover to the complainant. On opening this cover the camplainant discovered that instead of Government Currency Notes it contained a number of Khilafat Bonds Thereupon he reported the matter to the Post Office In the course of an inquiry accused stated that he had sent Government Currency Notes and not the Khilafat Bonds. It was held that no offence under this section was committed. Sulaiman, J, observed: "The mere fact that a cover insured for a certain amount is sent raises no presumption in law that the cover contains the necessary amount of Government Currency Notes It is, therefore, not easily conceivable what is the thing which the complainant would have done or omitted to do if the fraud contemplated by the accused had succeed [illegible]
he would ha [illegible]
the offence [illegible]
s. 192 of the Indian Penal Code The accused, however, has not been charged with any such offence"[6] Where a person receives money due to him from another which that other person pays, with the intention not to credit the money to the real debt due, but to deceive h [illegible]
money under the pretence [illegible]
owe upon a bond which he [illegible]
charge of cheating can be sustained even though the promise which induced the delivery of property was a promise to do a criminal act, or an act forbidden by law, and one which could not form a cause of action in a civil Court[8]

As to the meaning of 'fraudulently', see s. 25, *supra*, and of 'dishonestly,' s. 24. The word 'fraudulently' being used in the section together with the word 'dishonestly' must mean, if it is to have any meaning at all, something different from 'dishonestly'[9].

[1] *Raj Coomar Banerjee*, (1864) W. R. (Gap. No) Cr 25

[2] *Henry Williams*, (1836) 7 C. & P. 354.

[3] *Paruchury Venkatappayya*, (1916) 18 Cr. L. J. 40.

[4] *Karachi Municipality* v. *Bhojraj*, (1915) 9 S. L. R. 97.

[5] *Raman Behari Roy*, (1923) 50 Cal. 849, 852; *Kunju*, (1923) 37 M. L. T. 187.

[6] *Tula Ram*, (1923) 21 A. L. J. 865, 867, 868 *Sadho Lal*, (1916) 1 P. L. J. 391, commented. on. See *Kunju*, sup, on the point of an offence under ss. 193-511.

[7] *Ramanath Kalapakar*, (1905) 2 C.L.J. 524. Mookerjee, J., expressed a contrary opinion.

[8] *Meera*, (1917) 10 B. L. T. 255.

[9] Per Henderson, J., in *Dalu Ram Rai*, (1905) 32 Cal. 775, 779.

'Any property to any person'.—It is no objection to an indictment for this offence that the thing obtained was not in existence at the time of cheating, provided the thing when made is delivered under the influence thereof[1].

Whether an article is or is not 'property' does not depend upon its possessing a money or market value. If it has some special value for the person, or persons concerned, it is "property", even though its value cannot be measured in money[2]. A health certificate is property within the meaning of this section[3]. So is a certificate of having passed an examination[4], or a ticket entitling its holder to enter an examination room[5], or a railway ticket[6], or a warrant[7].

Delivery to 'any person' includes even an agent, and the post office can be deemed to be such an agent. The accused sent from Madras by value payable parcel to a person at Hyderabad four boxes of tea. The person got delivery at Hyderabad on payment of Rs. 168. But when he opened the boxes he found they contained saw-dust. The accused was charged with an offence under s. 419. It was held that the offence was completely committed in Hyderabad and the Madras Court had no jurisdiction. The deceit and the delivery in consequence of the deceit were complete when the money was handed to the post office. And the subsequent delivery by the post office to the accused was not a necessary ingredient of the offence to bring it within the operation of s. 179, Criminal Procedure Code[8].

'To consent that any person shall retain any property'.—It is equally a cheat whether a deception causes a person fraudulently or dishonestly to acquire property by delivery, or to retain property already in his possession. If a man to whom property is lent or who is entrusted for a time with the charge of it deceives the owner and thereby induces him for some purpose of wrongful gain to the borrower or wrongful loss to the owner to allow the property to be retained in the borrower's possession, this amounts to cheating[9].

Cases.—Inducing the person deceived to deliver property.—Where a person hired certain property for use at a wedding, paying a portion of the hire, and giving a written promise to pay the balance of the hire, and to restore the property after the wedding, he being well aware that there was to be no wedding, and intending, when he got the property, to apply for its attachment in a civil suit in respect of an alleged claim[10]; where the accused received a Government promissory note, promising to return certain jewels pledged to them but not intending to do so, and they subsequently claimed to return the note for another debt alleged to be due to them by the sender[11]: and where a person obtained delivery of a valuable security under the inducement of a promise not intended to be kept and with fraudulent intention[12], this offence was held to have been committed.

The accused was alleged by the prosecution to have advertised that a work on English idioms by Robert S. Wilson, M.A., was ready, stating that the price was Rs. 2-4-0 and that intending purchasers might remit it by money order to Robert S. Wilson, Council House Street, Calcutta, to have then requested the Postal Authorities at Calcutta, by a letter signed Robert S. Wilson, to have the money orders re-directed to him as above at Rajam; to have similarly requested the Post Master at Rajam to pay the money orders to his clerk Sheshgiri Rau; and to have subsequently received the value of money orders made out in favour of Robert S. Wilson, from the Post Master of Rajam, signing receipts as Sheshgiri Rau. Robert S. Wilson and Sheshgiri Rau were alleged to be fictitious persons, and it

1 *Henry Martin*, (1867) L. R. 1 C. C. R. 56.
2 *Local Government* v. *Ganga Ram*, (1921) 18 N. L. R. 52.
3 *Packinathan*, (1919) 11 L. W. 368.
4 *Local Government* v. *Gangaram* sup.
5 *Appasami*, (1889) 12 Mad. 151.
6 *Horace Chapman*, (1910) 4 Cr. App. R. 276.
7 *Harishanker Gangaram*, (1904) 6 Bom. L. R. 375.
8 *M. A. Kaleek*, [1927] M. W. N. 221.
9 M. & M. 382.
10 *Kadir Bux*, (1871) 3 N. W. P. 16.
11 *Sheodurshan Dass*, (1871) 3 N. W. P. 17.
12 (1880) 1 Weir 478.

was alleged that the accused had no book on English idioms ready to be despatched to purchasers. It was held that the above allegations supported the charges of cheating and forgery[1].

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sale going to the accused and the accused, being liable to pay to the complainant's firm the capital advanced with interest, and a commission of one anna per maund of rice sold. The accused failed to deliver the rice within the stipulated time and was charged with cheating. The representations made by the accused to the complainant's firm when getting the advance were not entirely false, and it appeared that the accused had to some extent endeavoured to carry out the terms of the

of the money to his own use was not in itself sufficient to prove that his intention, when he received the money from the complainant's firm, was dishonest or that he obtained it by a fraudulent misrepresentation of facts. The important question to be considered was whether the accused, when he took over the money from the
the contract[2].
he gave a promissory note,
adjoining creek and that he
. he then absconded. It was
held that the conviction under this section was good; that the facts warranted the inference that the accused, at the time of obtaining the advance, had no intention of performing his promise[3]. The accused, who was the complainant's paddy-broker and regular paddy-supplier, took from them advances for the purchase of paddy and gave promissory-notes for the advances in question. From time to time he had supplied paddy the total quantity of which, however, had not been sufficient to satisfy all the advances He last obtained an advance of Rs 4,000 when there was
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facts did not warrant the inference that the accused, at the time of obtaining the advance, had no intention of performing his promise and that, in the absence of proof of any representation at the time on the part of the accused, which he knew or, had reason to believe, to be false, there was no offence of cheating committed[4].

The accused, a judgment-debtor, applied for permission to raise the amount of the decree by a private transfer of his house, which had already been sold in
The accused mortgaged
s empowered to mortgage
to the decree-holder. He
got the mortgagee to pay the amount due to the decree-holder and received the

municated to the owner. The accused showed B a telegram which the latter understood to have come from C refusing the offer. He thereupon raised the offer and purchased the mare. Subsequently, he instituted these proceedings against the

[1] *Pera Raju*, (1889) 13 Mad. 27.
[2] *Ijjatulla Kazi*, (1906) 10 C. W. N. 1003.
[3] *Po Yon v. Mohr Brothers & Co., Ltd.*, (1911) 6 L. B. R. 38.
[4]

accused on the ground that deception was practised on him, but, when he was examined, stated that he would have paid the same price had he known that the mare belonged to the accused. It was held that no wrongful loss was caused to L by reason of the fact that he was induced to bid up to what he concidered to be the full value of the mare; and that by merely placing before L the telegram which purported to have been received from C, the accused could not be said to have acted fraudulently[1].

A and B went to C and B asked for a loan on the security of a ring seemingly, but not really, of gold. A assured C that B was an honest man, and thereby induced C to advance the money. B was convicted of cheating. It was held in revision that B's conviction was wrong as A's assurance was the effective inducement for C's advancing the money irrespective of the question whether B's dishonesty was or was not proved[2]. The accused drew a *hundi* and borrowed money on it, without assuring himself that the drawee, with whom he had no previous dealings and who was not supplied with funds, would honour the same. The money so borrowed was spent by him on his own purposes. The *hundi*, when presented for payment, was dishonoured by the drawee. The accused, though apprised of the dishonouring, took no steps either to have the *hundi* honoured or to repay the money borrowed on the *hundi*, but made himself scarce. It was held that the accused was guilty of cheating[3].

Where a person induced a clerk under a false representation to deliver a warrant of attachment to him, and made on it an endorsement to his own advantage, and but for the false representation the clerk would not have parted with the warrant, it was held that the person committed the offence of cheating[4].

English cases.—Where a postman falsely pretended that 2*s.* was payable on a postal letter entrusted to him for delivery, whereas 1*s.* only was payable, this offence was held to have been committed[5]. It was the duty of the accused, who was an officer of a society, to return the names of members entitled to sick pay. He wrongfully entered on the list a member's name, which he gave to the secretary, and in due course received an order from the treasurer to pay the member the sum named. When the accused received the money he applied it in payment of a debt due from the member to himself. It was held that there was evidence upon which the jury might find that the money was obtained by the accused by a false pretence made by him to the treasurer[6]. Where a person put the name of a painter upon the copy of one of his pictures, in order that it may be passed off as the original, it was held that he had committed this offence and not forgery[7]. Under the Code this will amount to forgery.

3. **'Intentionally induces the person so deceived to do or omit to do anything'.**—By this clause "intentional deceptions are made punishable as cheats if they cause or are likely to cause any damage or harm, whether to property or to reputation. It is sufficient to constitute cheating within this clause if the deception is intended to cause any damage or harm whatsoever to the person deceived...The deception must be intended not only to induce the person deceived to do or omit to do something, but also to cause damage to that person. False statements are often made incautiously or carelessly or without sufficient information or inquiry and without any intention to deceive or injure. It may be observed of all incorrect or deceptive statements that they are not deceptions within this section, unless the person making them intends to induce the person to whom they are made to act upon the strength of such statements; even they are not deceptions within the definition unless the person who does or omits, etc., is induced to act by such

1 *Dick*, (1914) 12 A. L. J. 1258.
2 *Mata Prasad*, (1920) 18 A. L. J. 371.
3 *Uttamlal Narottamdas*, (1920) 23 Bom. L. R. 340, 6 Bom. Cr. C. 37.
4 *Harishanker Ganjaram*, (1904) 6 Bom. L. R. 375.
5 *Matthew Byrne*, (1866) 10 Cox 369.
6 *Taylor*, (1901) 65 J. P. 457.
7 *Closs*, (1857) 7 Cox 494.

statements and not by other independent motives; and lastly they will amount to the offence of cheating only when they are intended to cause damage or harm to that person"[1].

The word 'intentionally' only applies to the act or omission which the person deceived is induced to do or omit to do, and it is not necessary in order to sustain a charge under this branch of the definition that the accused person should also have intended to cause harm or damage as the result of such act or omission. It is sufficient if he intentionally induces the person deceived to do or omit to do anything which he would not do or omit to do if he were not deceived and the act or omission causes damage or harm to that person in body, mind, reputation or property[2]. The intention need not be fraudulent or dishonest In the latter part of the section the words 'fraudulently' or 'dishonestly' do not find a place[3].

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The accused, a cooly recruiter, induced the complainant to come to a cooly depot, and promising him domestic service entered his name in the books of the depot and wrote a letter to a cooly contractor in Calcutta offering the complainant as a cooly, on the same day the accused persuaded the complainant to go to a railway station to fetch a parcel and the accused bought a railway ticket for ... to get him to enter the train, but the com- ... the accused was to get the complainant to ... from there to Assam as a tea garden cooly. It was held that the act of the accused amounted to an attempt to cheat[7]

The accused, a fireman, applied for employment to the Locomotive and Carriage Superintendent of Burma Railways. He forwarded with his application ... N W. Railway ... engine-driver on ... ict, when in fact no such certificate had ever issued to him, nor had he ever worked as an engine-driver on that railway. It was held that he was guilty of an attempt to cheat and not of forgery[8]. Where a registered opium consumer got a license to purchase opium in one of his names and another license in the other of his names, and thereby obtained more opium than he would have done otherwise, it was held that he had committed the offence of cheating[9].

The accused proposed to the father of a girl for the hand of his daughter and obtained his consent and was admitted into his house. Subsequently, information was received by the father that the accused was a married man; this the accused admitted to be true. Shortly after the daughter who was major left the father's protection of her own accord and went to the accused. On the complaint of the parents the accused was convicted of cheating. It was held that the facts did not bring the case within s. 417, read with this section[10].

1 M. & M. 383.

6 (1868) 4 M. H. C. App. 12.

7 *Kishori Lal Chatterjee*, (1905) 9 C. W. N. 764.

8 *Fazal Din*, (1906) P. R. No. 1 of 1907.

9 *Milton v. Sherman*, (1918) 22 C. W. N. 1001.

10 *Tha Byaw*, (1905) 4 L. B. R. 315, F. B.

English cases.—The accused ordered goods of the prosecutors, and said he wished to pay ready money for them. He gave cheques on a bank and took away the goods. He had shortly before opened an account at the bank but had drawn out the amount deposited except a few shillings. It was held that he was guilty of cheating[1]. Where the accused conspired to obtain a passport from the Foreign Office by false representation in the name of M for his use in Russia intending that it should be used by some other person, it was held that they were guilty of cheating and criminal conspiracy[2]. The accused ordered a meal in a restaurant: he made no verbal representation at the time as to payment, nor was any question asked him with regard to it. After the meals he said that he was unable to pay, and that he had only one half-penny in his possession. It was held that he could not be convicted of the offence of obtaining goods by false pretences, but he was liable to be convicted of obtaining credit by means of fraud within the meaning of the Debtors Act, 1869[3]. In India such an act will be covered by the definition of cheating.

4. **'Causes or is likely to cause'.**—These words are very wide. Thus, under illustrations (*f*) and (*g*) deception as to a future event is criminal: this is not the case under English law. The expression 'or is likely to cause' may apply to such cases as the following: A by deception is induced to make an entry in his shop books that certain goods have been paid for, when in fact they have not; to give credit in account for a greater amount than has actually been paid; or to sign a receipt for a sum which has not been received. In these cases the thing which A is induced by deception to do is one which is likely to cause damage to A; for such admissions in his own handwriting would be weighty evidence against A's claim if they were produced against him or against his representatives after his death in a Court of Justice[4].

5. **'Damage or harm to that person in body, reputation or property'.** —"The illustrations throw no light on what is meant by damage or harm in body, mind or reputation and so far as such damage is concerned the offence is not very appropriately placed in the Chapter of the Code relating to offences against property. An essential ingredient of the offence is the damage or harm caused or likely to be caused in the said respects or in property. Generally speaking, a criminal offence consists in an act done by the accused with a specific criminal intent, or state of mind, constituting the *mens rea*. Difficulties connected with the notion of causation, common enough in other branches of the law, such as tort, seldom arise. It is true that negligence is sometimes punishable as an offence because it causes or is likely to cause hurt or injury to another (*cf.* ss. 279 and 280 and 284-287 of the Code). But cheating in the second form has this additional peculiarity. The damage is to be caused by the person deceived to himself. Indirectly it may be, the damage is to result from the deceit, but immediately it is to result from the induced act of the person deceived. This no doubt explains why the word 'injury', defined in s. 44 of the Code as 'any harm whatever illegally caused to any person in body, mind, reputation, or property' was not employed in s. 415. It does not appear to be necessary that the resulting damage or likelihood of damage should have been within the actual contemplation of the accused when the deceit was practised. But authorities in this Court lay down—(i) that the person deceived must have acted under the influence of the deceit...(ii) that the facts must establish damage or likelihood of damage...and (iii) that the damage must not be too remote...On the point of remoteness of damage, there seems no sound reason why a definition which presupposes wilful deceit on the part of the accused should be too narrowly interpreted. The word 'cause' doubtless

1 *Hazelton*, (1874) L. R. 2 C. C. R. 134; *Cosnett*, (1901) 20 Cox 6. See ill. (*d*) to s. 415.
2 *Brailsford*, [1905] 2 K. B. 730.
3 *William Jones*, [1898] 1 Q. B. 119.
4 M. & M. 384.

excludes damage occurring as a mere fortuitous sequence, unconnected with the act induced by the deceit, except as every event is connected with preceding events in an unending chain. On the other hand the definition, as it stands, is wide enough to include all damage resulting or likely to result as a natural consequence of the induced act"[1].

The deception must be intended to cause damage to the person who is deceived. If A by deception induce B to make an incorrect statement to C, a master, concerning the conduct or character of one of his servants, which mis-statement causes C to prosecute or dismiss the servant, here the deception causes no damage or harm to B, the person deceived, and is therefore not, so far as he is concerned, within the definition[2].

Again, the 'damage or harm' caused, or likely to be caused, must be the necessary consequence of the act done by reason of the deceit practised, or must be necessarily likely to follow therefrom[3], and not any remote possibility flowing from the act. The proximate and natural result only of the act induced has to be considered, and not any vague and contingent injury that may possibly arise[4]. Loss from non-delivery of goods arises from breach of the contract and not from

Neither the section nor the illustrations indicate what the meaning of causing harm in 'body, mind or reputation' is. Each and every illustration is confined to the kind of cheating which causes wrongful gain or wrongful loss, or which causes harm only in respect of property. Injury to body or to 'reputation' is explicable. But 'harm in mind' is not. It is difficult to say whether the authors of the Code intended thereby to mean mental gain or injury to the mental powers. Civil law does not take into account mental pain and suffering unattended by physical injury[5].

their pleader to write to the latter firm, and demand fulfilment of the contract. The accused then went to the pleader, falsely represented himself to be a member of the complainant's firm and instructed the pleader to write a letter in the name of the complainant's firm to B. & Co., stating that the contract was cancelled by the complainant's firm. The pleader wrote the letter but on reference to the complainant's firm refrained from despatching it. It was held that the accused had ... le as he fraudulently induced ... d not have written, and as, ... have caused injury to the pleader in mind, reputation, and perhaps in his business, and might have involved him in litigation[7].

[1] Per Richardson, J., in *Legal Remembrancer v. Manmatha Bhusan Chatterjee*, (1923) 51 Cal. 250, 260.

[2] M. & M. 384

[3] *Mopey*, (1890) 17 Cal. 606; *Muhammad Shah*, (1918) P. R. No. 31 of 1918; *Legal Remembrancer v. Manmatha Bhusan Chatterjee*, sup.

[4] *Harendra Nath v. Jyotish Chandra*, (1924 52 Cal. 188

[5] *Ibid*; *Sarda Saran*, (1923) 21 A. L. J. 873.

[6] *Lynch v. Knight*, (1861) ... 598.

[7] *Mahadev Lal v.* ... 12 C. W. N. 730, 7 C. L.

the representation was made either in body, mind, reputation or property within the meaning of this section the accused could not be convicted under ss. 419 and 511[1]. The accused, a judgment debtor, gave a cheque to the decree-holder not in token of immediate satisfaction of the decree but only as a security and as a measure of accommodation to enable the judgment-debtor to provide means for honouring the cheque within a convenient period after issue or to otherwise satisfy the decree, and one week's time for settlement was taken from the Court. The cheque was dishonoured, and the accused was thereupon prosecuted for cheating. It was held that the element of fraud or dishonesty was absent and there was no delivery of property and there was no damage or harm to the complainant in body, mind, reputation or property[2].

The accused applied to the postal authorities and obtained an appointment in the Postal Department but he had not mentioned in his application that he was dismissed from Government service. He was charged with and convicted of cheating as he did not state the fact of his dismissal in his application. Knight, J., said: "I find no difficulty in concluding that the petitioner's silence regarding his previous employment deceived and was meant to deceive the authorities of the Post Office, and thereby procured him an appointment that he would not otherwise have obtained. But I do not think that this amounts to an offence under section 415, Indian Penal Code. For neither the act of appointment, nor the omission to inquire into the petitioner's antecedents caused, or was likely to cause, damage or harm 'to the body, mind, reputation, or property' of the person deceived. Such damage or harm must, I take it, be the proximate and natural result of the act or omission: and we cannot include in it such vague and contingent injury as might arise from the discredit that might attach to the Department, from the employment of a man of doubtful character. It has not been suggested that the damage to be apprehended was that which might be caused by the petitioner's dishonesty; and this too would be a consequence too remote for the purposes of the section. I therefore agree that the conviction should be quashed"[3]. Where the manager of a firm was induced by the false representation of the accused to accept a bought note with a non-existent firm for the purchase of jute, and to sign a receipt for the note, it was held (as to the receipt) that the case did not fall within the first part of this section, as the accused had no intention to cause wrongful loss or wrongful gain to any one by inducing the manager to make out or give a receipt for the bought note, which had been actually made over to him, but at most an intention to hold him to the contract. As to the note it was held that the case did not fall within the second part of this section as no loss of property or harm to the manager's reputation resulted proximately and necessarily from the act itself which he was induced to do, viz., acceptance of the contract[4]. A licensed book-maker, on the assurance of the opposite party that he would pay up his losses, if any, punctually on the settling day, allowed the latter to take bets on credit. The opposite party failed to pay his debts and on different dates paid cheques to the petitioner and induced him to accept further bets on credit. It was held that although the petitioner was deceived and thereby induced to take bets on credit from the opposite party, it could not be said that the act which the petitioner was induced to do by reason of such deception had caused or was likely to cause damage or harm to him in body, mind, reputation or property. It did not follow that if the petitioner had refused to take bets on credit, the opposite party would of a certainty have had to offer bets by paying cash. The opposite party might not have offered any bets at all. Therefore the offence of cheating

1 *Manikam Pillai*, (1909) 19 M. L. J. 271.

2 *Sheo Saran Vaish* v. *Jitendra Nath Daw*, (1928) 5 O. W. N. 357.

3 *Kashinath Mahadev Phatak*, Criminal Application for Revision No. 402 of 1909, decided on February 24, 1910, Chandavarkar and Knight, JJ. (Unrep. Bom.)

4 *Harendra Nath* v. *Jyotish Chandra*, (1924) 52 Cal. 188.

was not committed[1]. The unauthorized allotment of more wagons to a colliery than they were entitled to, through the fraudulent or dishonest acts of the servants of a railway company would not cause, or would not be likely to cause, any appreciable damage to the railway company's reputation, as the damage would be too remote[2].

Certain recruits were rejected by a Recruiting Officer at Lahore as unfit. The accused took them to Lyallpur and offered them to a *Lambardar* on condition that he would pay Rs. 50 for each recruit. It was arranged that this money would only be paid if the recruits were accepted by the Recruiting Officer. The *Lambardar* asked the accused whether the recruits had already been rejected and they replied in the negative. The *Lambardar* on presenting the recruits to the Lyallpur Recruiting Officer was told by that Officer's orderly that they had already been rejected in Lahore It was admitted that the *Lambardar* was not liable to any punishment departmentally as merely presenting rejected recruits was not an offence unless it was done knowingly It was held that no offence under ss. 420 and 511 had been established as the money was not to be paid to the accused by the *Lambardar* unless the recruits were accepted It was further held that the first and second ingredients of the offence of cheating existed, but not the third, seeing that the *Lambardar's* action in presenting the recruits not knowing that they had been previously rejected was not likely to cause him any harm or injury at all There was only a possibility [illegible] was not at once accepted, [illegible] the person deceived in [illegible] this section must be the necessary consequence of the act done by reason of the deceit practised, or must be necessarily likely to follow therefrom[3].

Explanation.—Concealment of any facts which deceive a person must be dishonest; an improper concealment or suppression of a material fact, which the party concealing is legally bound to disclose, and of which the other party has a legal right to insist that he shall be informed, is fraudulent. Where the cheating consists in concealment, it must be shown that *suppressio veri* was a violation of a legal duty or it was an illegal omission in fact[4]. Where the accused, who was indebted to the complainant, despatched to the latter an envelope insured for Rs. 530 containing two pieces of waste paper, intending to use the receipt for the same as evidence of payment of Rs 530 towards the liquidation of his debt to the complainant, it was held that the accused was guilty of an attempt to cheat[5].

The explanation to this section refers to the actual deception itself and not to the concealment of a deception by some one else[6].

Puffing.—The authors of the Code say: "If all the misrepresentations and exaggerations in which men indulge for the purpose of gaining at the expense of others were made crimes, not a day would pass in which many thousands of buyers and sellers would not incur the penalties of the law. It happens hourly that an article which is worth ten rupees is affirmed by the seller to be cheap at twelve rupees, and by the buyer to be dear at eight rupees The seller comes down to eleven rupees, and declares that to be his last word; the buyer rises to nine, and says that he will go no higher; the seller falsely pretends that the article is unusually good of its kind, the buyer that it is unusually bad of its kind; the seller that the price is likely soon to rise, the buyer that it is likely soon to fall. Here we have deception practised for the sake of gain, yet no judicious legislator would punish

[1] *H. K. Bhedwar* v. *Rao Shahat C. S. R. Rao*, (1923) 27 C. W. N. 919, 39 C. L. J. 273.

[2] *Legal Remembrancer* v. *Manmatha Bhusan Chatterjee*, (1923) 51 Cal. 250

[3] *Muhammad Shah*, (1918) P. R. No. 34 of 1918.

[4] *Bishen Das*, (1905) 27 All. 561. See *Dori Lal*, (1919) 17 A. L. J. 500, 1 U. P. L. R. 58; *Sada Ram*, (1920) 18 A. L. J 408

[5] *Arura*, (1912) P. L. R. No. 299 of 1913.

[6] *Nga Po Maung*, (1895) 1 U. B R. (1892-1896) 255.

these deceptions...The moralist may regret this; but the legislator sees that the result of the attempts of the buyer and seller to gain an unfair advantage over each other is that, in the vast majority of cases, articles are sold for the prices which it is desirable that they should fetch; and therefore he does not think it necessary to interfere. It is enough for him to know that all this great mass of falsehood practically produces the same effect which would be produced by truth; and that any law directed against such falsehood would in all probability be a dead letter, and would, if carried into rigorous execution, do more mischief in a month than all the lies which are told in the making of bargains throughout all the bazaars of India produce in a century"[1].

Where the allegation against the accused was that he advertised in the papers that he was willing to sell an almost new jazz set, and the complainant answered the advertisement and after some correspondence sent the price settled to the accused, and on receipt of the goods the complainant found that they were not of the quality he expected according to the advertisement and certain articles mentioned in the list were not sent, and the accused was summoned to answer a charge of cheating; it was held that the allegations were insufficient to justify the prosecution of the accused for a criminal offence, and the proceedings against the accused were quashed. The giving of untrue praise of articles by a seller does not amount to a criminal offence[2].

English cases.—A simple misrepresentation of the quality of goods is not a false pretence[3]. In order to obtain an advance of money on a large quantity of plated spoons, the defendants represented to a pawn-broker that they were of the best quality, that they were equal to Elkington's A, that the foundation was the best material, and that they had as much silver upon them as Elkington's A. The jury found that these representations were wilfully false, and that by means of them an advance of money was made. It was held that the representation being a mere exaggeration or puffing of the quality of the goods in the course of a bargain, it was not a false pretence[4]. This case was governed by the maxim *simplex commendatio non obligat*. Any exaggeration or deception in the ordinary course of dealings between the buyer and the seller during the progress of a bargain cannot be the subject of a criminal prosecution. But when the thing sold is of an entirely different description from what it is represented to be and the statements made are not in form an expression of opinion or mere praise, the offence of cheating will be committed. Where, therefore, the accused induced the prosecutor to purchase a chain from him by fraudulently representing that it was 15 carat gold, when, in fact, it was only a trifle better than 6-carat, knowing at the time that he was falsely representing the quality of the chain as 15 carat gold, it was held that the statement that the chain was 15-carat gold, not being mere exaggerated praise, nor relating to a mere matter of opinion, but a statement as to a specific fact within the knowledge of the accused, was a false pretence[5].

The accused induced the prosecutor to buy certain plated goods plate, at an auction for £7 on the representation that they were the best silver lined with gold, and worth £20. The foundation of the goods was Brittannia metal, instead of nickel, as in the best goods, covered with a transparent film of silver, and they were worth only about 30*s*. It was held that there was no false pretence. The Court said: "It is most important not to bring within the criminal law the ordinary enhancing of value and quality by the seller of goods. There is always a conflict of knowledge and skill between a buyer and seller, the one wishing to buy as advantageously, and the other to sell as advantageously as he possibly can, and it would be very dangerous to extend the criminal law to such cases. At present the

[1] Note N, p. 163.
[2] *Da Costa* v. *Deefholts*, (1924) 29 C. W. N. 362.
[3] *Bryan*, (1857) 7 Cox 312.
[4] *Ibid.*
[5] *John Ardley*, (1871) L. R. 1 C. C. R. 301; *Roebuck*, (1856) 25 L. J. (M. C.) 101.

line is fixed, and there must be a false representation of an existing fact, operating on the mind of the buyer, and deceiving him in such a manner that he cannot protect himself against it"[1].

Statutory application.—The Bombay City Police Act (Bom. Act IV of 1902), s 126; the Madras City Police Act (Mad. Act III of 1888), s. 51.

CASES.

Vendor and purchaser.—The selling of milk and water in about equal proportion as pure milk would support a finding of cheating[2]. Where a person was purposely sent to buy milk knowing it was watered, in order to prosecute the seller, it was held that as there was no deception a conviction for cheating would not stand[3] But according to *Government of Bengal* v. *Umesh Chunder Mitter*[4], the seller would probably be guilty of an attempt to cheat. Where the accused sold nasty sweetmeats, it was held that he could not be held guilty of this offence as the purchaser might have tasted the sweetmeats before buying them[5] Where the accused sold liquor, measuring it with a glass which was not a prescribed measure, and of which they fraudulently misrepresented the capacity, it was held that they ought to have been tried for this offence and not for one under s. 265[6]. Where a licensed opium vendor sold opium at rates higher than those fixed by the Government, it was held that he had committed this offence[7]. Where the vendor of immoveable property omitted to mention that there was an incumbrance on the property, it was held that he could not be convicted of cheating unless it was shown either that he was asked by the vendee whether the property was incumbered and said it was not, or that he sold the property on the representation that it was unincumbered[8].

The vendee defendant in a suit for pre-emption compromised the suit, the plaintiff agreeing to pay a certain sum in cash and to discharge certain incumbrances on the property in suit It was subsequently discovered that the vendee had, after his purchase but before the suit, mortgaged the property, which was the subject of the suit for pre-emption. It was held that the vendee could not, on account merely of his omission to disclose the existence of this subsequent mort- [illegible] 'd certain trees to S which stood on land in [illegible] brought the land to sale under the mort- [illegible] the trees by him to S; but in the interim the mortgagor had given the trees in suit to other persons as compensation for certain trees which the mortgagor had wrongfully cut down. S was resisted in cutting the trees and found that the trees belonged to certain other persons S complained to D but D put him off and eventually drove him away with abuse and would not return the money. It was held that D was guilty of dishonestly concealing the facts within the meaning of the explanation of this section[10].

The accused contracted to supply to the complainants 260 bales of fully good machine ginned cotton. In fulfilment of this contract, he delivered as many bales largely composed of cotton-seed, raw cotton and rubbish, carefully packed into the middle, while all round the sides was placed good ginned cotton The percentage of the admixture was from 6 to 15 per cent. as against the normal admixture of ½ or 1 per cent. The accused was shown to have business relations with a factory

1 *Levine and Wood*, (1867) 10 Cox 374, 376.

[illegible]

Unrep. Cr. C. 350.

7 *Pandurang Ramchandra*, (1902) 4 Bom. L. R. 823.

8 *Bishan Das*, (1905) 27 All. 561; *Karachi* [illegible]

10 *Dori Lal*, (1919) 17 A L J. 500, 1 U. P. L R. 58.

which owned ginning machines which were capable of making the admixture, and was found to be present there whilst the machines were ginning such adulterated cotton. It was held that the accused was guilty of cheating[1].

Misstatement as to nature of goods.—The accused, a travelling hawker, represented to the prosecutor's wife that he was a tea-dealer, and induced her to buy certain packages which he stated to contain good tea, but three-fourths of the contents of which was not tea at all, but a mixture of substances unfit to drink and deleterious to health. It was held that he was guilty of false pretence[2].

Where the offence charged consisted of selling or pawning as genuine gold mohurs of the reign of Shahajahan silver rupees of that reign which had been gilt or in some way covered over with gold, it was held that this offence had been committed[3].

Where property is delivered, fraudulent or dishonest intention on the part of the accused is necessary: where any act is done, through deception, that act should have caused damage or harm.—Where the accused gave a false name and address in order to shield prosecution for an offence[4]; where the accused falsely told his master's brother that his master was ill in a certain village and so induced him to go to that village[5]; and where the accused presented a stolen note to a shop-keeper for encashment, and in reply to the inquiry of the shop-keeper after he had cashed the note gave his name falsely[6], it was held that this offence was not committed. Where the accused secretly entered an exhibition building without having purchased a ticket, and was there apprehended, it was held that such act did not amount to cheating because he had not made a false representation to anyone[7]. If the accused had said to the door-keeper that he had a ticket, and had thus obtained access to the building that would have been cheating. Where a person, who purchased rice from a famine-relief officer, at a certain rate, on condition that he should sell it at a pound less, was convicted of cheating because he did not sell it at the rate agreed on, it was held that as there was no wrongful gain or loss to anyone, no offence was committed[8]. For, the rice having been sold to him, and he having paid for it, it was not unlawful for him to sell it again at such price as he thought fit. The fact that a trader in a statement of his account included, amongst other articles delivered, an article, which the complainant alleged she had returned, was held not to amount to cheating unless it was proved that he had intentionally done so with an intention to defraud and had obtained a payment of the whole bill or of the bill in part including the price of that article[9]. Where a person attempted to obtain his recruitment in the police by giving certain information, which he knew to be false, to the District Superintendent of Police, it was held that he had not thereby committed the offence of attempting to cheat, because the act was not likely to cause damage or harm to the person deceived in body, mind, reputation or property[10]. Where the accused promised to withdraw his charge against the complainant's brother-in-law and others without intending to do so, and thereby deceived the complainant and induced him to withdraw his charge against the accused, it was held that the act of the complainant so induced by the accused's deceit could not be said to be one likely to cause damage or harm to him in body, mind, reputation or property within the meaning of this section and that the accused was not, therefore, guilty of cheating[11]. Where a person was charged with cheating the Registrar of the University of Madras by

1 *Kanji Shivaji*, (1912) 14 Bom. L. R. 137, 1 Bom. Cr. C. 78.
2 *Foster*, (1877) 2 Q. B. D. 301.
3 *Khushali*, (1906) 29 All. 141.
4 *Ladka*, (1893) Cr. R. No. 10 of 1893, Unrep. Cr. C. 635.
5 *Punjia*, (1888) Unrep. Cr. C. 423.
6 *Shaikh Basit*, (1883) 1 Weir 479.
7 *Mehervanji Bejanji*, (1869) 6 B. H. C. (Cr. C.) 6.
8 *Lal Mahomed*, (1874) 22 W. R. (Cr.) 82.
9 *Baij Nath Ram Marwari* v. *Burges*, (1900) 5 C. W. N. 255
10 *Dwarka Prasad*, (1883) 6 All. 97.
11 *Durgiah*, (1892) 1 Weir 477.

passing himself off for another person and trying to obtain a duplicate of the Matriculation certificate of that other person, it was held that as there was no proof of harm or damage to the Registrar or to the University and no wrongful gain to the accused or loss to the University the charge of cheating must fail[1]. Where the accused, a public servant, purchased at an auction a quantity of waste paper, bidding for it under an assumed name, it was held that in the absence of any rule forbidding employees in the office to bid at such sales, the conviction of the accused under this section could not be sustained[2]. The accused were charged before the District Magistrate with cheating in that they waylaid certain intending customers of the complainant and falsely represented themselves as belonging to the complainant's shop, took them to their own shop on the pretence that it was the shop of the complainant and sold sweets to them. It appeared that the customers sustained no pecuniary loss in consequence of the accused's acts who apparently had not tried to make anything out of their victims and had only charged the market rate for the sweets. The Magistrate convicted the accused of cheating, holding that the deception must have injuriously affected the business of the complainant. It was held that the conviction was bad[3].

The accused, a shopkeeper, having sold goods worth Rs 2-13-0 to a customer, received in payment two currency notes one of Rs. 2-8-0 and the other of Re 1. Instead of returning eleven annas, as he ought to have done, he paid only 0-9-3 to the customer, saying that the notes were not worth their face value. On these facts, the accused was convicted of cheating. It was held in revision that the offence of cheating was not committed, for there was no deceit, inasmuch as the customer was not induced to hand over the notes by any representation on the part of the accused that he would get change calculated on the face value of the notes but the notes were handed over in the ordinary course of the sale and purchase and what really happened was that a dispute then arose as to the correct amount of the change due to the customer[4].

With a view to escape the payment of just dues of their creditors, the accused, who were retail traders, fraudulently induced the [illegible] before the closing of the civil Courts for vacation, to grant them some time to pay up. Their object in gaining time was to remove the goods from their shop. The civil Courts having closed within the time thus granted, the creditors were prevented from seeking any remedy in the civil Courts. It was held that as time was obtained fraudulently the accused were guilty of cheating[5].

The accused, who was the complainant's paddy-broker and regular paddy- [illegible] promissory [illegible] paddy the [illegible] advances. He last obtained an advance of Rs 4,000 when there was already due to the complainants a large sum on the previous advances, but only supplied a further small lot of paddy, valued at Rs. 800, and was in consequence prosecuted in respect of this last advance. It was held that the facts did not warrant the inference that [illegible] no offence of cheating was committed[6].

1 *Srinivasan*, (1902) 25 Mad. 720. This case lays down bad law. It is opposed to [illegible]

2 [illegible]

[illegible]

6 *Maung Po Lu*, (1923) 1 Ran. 307.

False entries.—Where the accused was requested to make an entry in a book of accounts, belonging to the complainant, to the effect that he was indebted to the complainant in a certain sum found due on a settlement of accounts, instead of making this entry entered in a language not known to the complainant that this sum had been paid to the complainant, it was held that he had committed an offence of attempt to cheat, and not one under s. 465[1]. Where the lessee of a forest presented false accounts to a forest officer in order to defraud the Government, it was held that the offence committed was that of attempt to cheat[2].

Fraud by railway passengers.—Where a passenger travelled in a carriage of higher class than that for which he had paid fare[3]; and where a passenger gave some part of his luggage to a co-passenger to evade the charge for over-weight[4], this offence was held not to have been committed. Where a man endeavoured to evade payment of a railway fare by the production of an old pass altered as to date and number of persons, it was held that he was guilty of an attempt to cheat[5]. Where a railway employee obtained a free pass for his wife and mother and handed it over to a woman who was neither his wife nor his mother and she used it, it was held that he was guilty of cheating under s. 420 and not under s. 112 of the Railways Act[6].

Abetment.—The forwarding of fictitious consignment notes was held to be abetment[7]. The accused by falsely representing F, a notorious and practised gambler well skilled in all the tricks of gambling, to be a rich merchant, induced the prosecutor to gamble with him, on the representation that the merchant would fall an easy prey if the prosecutor gambled with him, and he (the prosecutor) was thus induced to part with all his property. It was held that those facts were sufficient to sustain a conviction for abetment of cheating[8].

Cheating by personation.

416. A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation.—The offence is committed whether the individual personated is a real or imaginary person.

ILLUSTRATIONS.

(*a*) A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.

(*b*) A cheats by pretending to be B, a person who is deceased. A cheats by personation.

COMMENT.

Ingredients.—This section requires any one of the following essentials:—

1. Pretention by a person to be some other person.
2. Knowingly substituting one person for another.
3. Representation that the person representing or any other person is a person other than he or such other person r

"To 'personate' means to pretend to be a particular person"[9]. "As soon as a man by word, act, or sign holds himself forth as a person entitled to vote with

1 *Kunju Nayar*, (1888) 12 Mad. 114.
2 *Ramajirav Jivbajirav*, (1875) 12 B. H. C. (Cr. C.) 1.
3 *Dayabhai Parjaram*, (1864) 1 B. H. C. 140.
4 *Paras Ram*, (1903) P. R. No. 25 of 1903.
5 *Gunpat*, (1868) P. R. No. 6 of 1868.
6 *Ram Dayal*, (1925) 2 O. W. N. 510.
7 *Raghunath*, (1889) Unrep. Cr. C. 470.
8 *Jahana*, (1904) P. R. No. 4 of 1905.
9 Per Crompton, J., in *Hague*, (1864) 4 B. & S. 715, 720, 33 L. J. (M. C.) 81.

the object of passing himself off as that person, and exercising the right which that person has, he has personated him"[1]. If a person at Oxford, who is not a member of the University, go to a shop for the purpose of fraud, wearing a commoner's cap and gown, and obtain goods, this appearing in cap and gown is a sufficient thing, although nothing passed in words[2].

Explanation.—The person personated may be a real or an imaginary person.

CASES.

False personation at an examination.—Where A falsely represented himself to be B at a University Examination, got a hall-ticket under B's name, and wrote papers in B's name, it was held that A had committed the offence of cheating by personation and forgery[3].

Personation before a public servant.—A female vendor started for D, in company with three persons, to get her deed of sale registered. She fell ill on the way, and her three companions went to the Registrar's office One of them, a woman, there personated the vendor, and got registry of the deed. She was convicted under this section and the other two of abetting the offence. It was held that as there was no apparent intention on the part of the accused to injure or defraud any one, the convictions should have been under the Registration Act and not under the Code[4]. Similarly, where a servant purchased a stamp paper of his master, giving his master's name as if it had been his own, it was held that a conviction under this section was bad, inasmuch as although there might have been personation, there was no cheating as there had been no fraudulent intent[5].

Where the accused was found to have knowingly represented one J to be B, the mother of a sepoy K, who had been killed in action, and thereby induced [illegible] to which she was not entitled, it

[illegible] without ticket and on arriving at the place of destination presented a forged railway pass made out in the name of the "Servant of Mr. Brown, Assistant Auditor"—a description which did not apply and never had applied to him, it was held that as it was not proved whether he had shown the pass to a Ticket Examiner before the completion of his journey, he was guilty of an attempt to cheat under this section[7]. A and L induced the *muharrir* at a fair to write out a certificate of sale of a mare giving S as the name of the seller and L as the purchaser. A posed as S and affixed thereto his thumb-mark. It was held that as the *muharrir* was deceived, A and L were guilty of an offence under this section whatever reason they had for deceiving him and inducing him to write a false certificate[8].

Where a person falsely personated another and induced a Health Officer to deliver to him a health certificate it was held that he was guilty of this offence[9].

Personation by a witness.—A witness falsely deposing in another's name should be charged with giving false evidence, under s. 193, and not with cheating by personation[10].

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[1] Per Blackburn, J., in *Hague*, (1864) 4 B & S. 715, 721.
[2] *Barnard*, (1837) 7 C. & P. 784.
[3] *Appasami*, (1889) 12 Mad. 151. See *Ganesh Khanderao*, (1889) 13 Bom. 506.
[4] *Loothy Bewa*, (1869) 11 W. R. (Cr.) 24, 2 Beng. L R. (A. Cr. J.) 25 See *Mojey*, (1890) 17 Cal. 606, followed in *Balaku Vithu*, Criminal Revision No. 202 of 1909, decided [illegible]

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[8] *Ahmada*, (1913) P. R. No. 9 of 1914.
[9] *Packinathan*, (1919) 11 L. W. 368.
[10] *Prema Bhika*, (1863) 1 B. H. C. 89.

False representation as to caste.—Where the accused represented to the prosecutor that a girl was a Brahmin and thereby induced him to part with his money on consideration of the marriage of the girl to his brother, when the girl really was Sudra, it was held that he was guilty of cheating by false personation[1]. But the former Chief Court of the Punjab was of opinion that a person could not be convicted of an offence under this section for disposing of a girl representing her to be of a different caste from that to which she belonged[2]. It held that to describe a Brahmin woman as a Kirari[3], or a sweeper woman whose husband was alive as a *jat* widow[4] was not an offence under this section but one under s. 420.

Misrepresentation as to position in life.—The first illustration indicates that a misrepresentation by false description of one's position in life falls under this section. Where, therefore, a document purported to have been signed by G. L., a *putwaree*, and it was said that it was signed by G. L., but at a time when G. L. was not a *putwaree*, it was held that this offence was committed[5]. Similarly, where a person represented a girl to be the daughter of a certain woman of good family, when she was within his knowledge the daughter of another woman, it was held that he was guilty of this offence[6].

False statements as to name and performances.—Entries for two handicaps were sent to the secretary of an athletic meeting, in the name of Sims, containing a statement as to the recent performances of Sims, which were very moderate, and in consequence Sims was given long starts. The entries were not written by either Sims or the accused. At the meeting the accused, who was a good runner, personated Sims, who was absent, and came first in both the races. After the first race the handicapper asked the accused whether he was really Sims, whether the performances given in the entry form were really his, and whether he had never won a race, as stated in the entry. He answered these questions falsely in the affirmative. It was held that the accused was rightly convicted of attempting to obtain property by false pretences[7]. Under the Code this offence will fall under this section.

417. Whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Punishment for cheating.

COMMENT.

This section punishes simple cases of cheating. When there is delivery of any property or destruction of any valuable security s. 420 is the proper section to apply[8]. The offence under this section is non-cognizable, the one under s. 420 is cognizable.

PRACTICE.

Evidence.—Prove (1) that the person deceived delivered to someone, or consented that some person shall retain certain property.

(2) That the person deceived was induced by the accused to do as above.

[1] *Mohim Chunder Sil*, (1871) 16 W. R. (Cr.) 42. See *Komul Dass*, (1865) 2 W. R. (Cr.) 7; *Puddomonie Boistobee*, (1866) 5 W. R. (Cr.) 98; *Dabee Singh*, (1867) 7 W. R. (Cr.) 55; *Bhaiji*, (1886) Unrep. Cr. C. 301, Cr. R. No. 69 of 1886.

[2] *Singhara*, (1903) P. L. R. No. 149 of 1903.

[3] *Durga Das*, (1904) P. R. No. 13 of 1904.

[4] *Jhanda Singh*, (1917) P. R. No. 16 of 1918; *Raj Bahadur*, (1918) P. W. R. No. 28 of 1918.

[5] *Joy Kurn Singh v. Man Patuck*, (1874) 21 W. R. (Cr.) 41.

[6] *Dhunput Ojhah*, (1867) 7 W. R. (Cr.) 51.

[7] *Button*, [1900] 2 Q. B. 597.

[8] *Sher Singh*, (1928) 10 Lah. 513

(3) That such person acted upon such inducement in consequence of his having been deceived by the accused.

(4) That the accused acted fraudulently or dishonestly when so inducing that person.

Or prove (1) that the person deceived did, or omitted to do, something which he was not bound to do or omit to do.

(2) and (3) as above.

(4) That the accused so induced that person intentionally.

(5) That such act or omission caused, or was likely to cause, damage or harm to that person in body, mind, reputation or property.

There must be some evidence of fraudulent or dishonest intention at the time of the omission of the act in respect of which the cheating is alleged[1]. Subsequent conduct of the accused would be evidence to show the previous dishonest ... rial of an indict- ... ces, evidence of ... the indictment is admissible, is whether the evidence is relevant. A connection must be shewn to exist between the acts which are the subject of the indictment and the acts sought to be proved. The fact that the subsequent act show that the accused has committed an offence distinct from that which is charged in the indictment is not sufficient to make evidence of the subsequent acts admissible if a connection is shown to exist between the transactions[3]. The accused was tried for obtaining eggs by false pretences; it was proved that he had falsely represented by advertisement in newspapers that he was carrying on a bona fide dairyman's business Evidence was admitted that subsequent to the transaction in question he had obtained eggs from other persons by means of similar advertisements. It was held that such evidence was admissible[4]. The accused was indicted for obtaining a cheque by falsely pretending that another cheque, which he then gave to the prosecutor, was good and valid order for the payment of money. The prosecutor deposed that he gave his cheque to the accused on the faith of the accused's statement that a cheque, which the accused then gave to the prosecutor, was a good cheque. The cheque given by the accused was dishonoured The accused stated that when he gave the cheque he expected a payment which would have enabled him to meet it The accused was acquitted. He was then tried on a second indictment, charging him with obtaining from other persons three sums of money on three cheques which were dishonoured. To prove guilty knowledge the prosecutor in the first case was called, and gave the same evidence as in the first case. It was held that his evidence was admissible for the purpose of proving guilty knowledge[5].

At the trial of an accused person on an indictment charging him with ...

as it did not show a systematic course of fraud, but merely that the accused was ...

1 *Hargovandas*, (1872) [9 B H. C. 448; *Fazul*, (1886) Cr. R No. 66 of 1887, Unrep. Cr. C 312; *Venkatachala Pillai*, (1888) 1 Weir 476; *Virasicami*, (1881) 1 Weir 478.

2 *Herramun Hulwye*, (1866) 5 W. R (Cr.) 5

3 *Smith*, (1905) 20 Cox 804.

4 *Rhodes*, [1899] 1 Q. B 77.

5 *Ollis*, [1900] 2 Q. B 758.

6 *Fisher* 1910] 1 K. B 149

Evidence with regard to a previous act of fraud alleged to have been committed by an accused who is on his trial on a charge under s. 420, is inadmissible in law. Such evidence cannot be brought in either under s. 14 or s. 15 of the Indian Evidence Act, the case being one in which the innocence or guilt of the accused depends upon proof of actual facts and not upon the state of the accused's mind[1]. On a charge against the accused of cheating by falsely representing that he was the *dewan* of an estate and could procure for the complainant an appointment to the vacant post of manager to the estate, and thereby obtaining a sum of money as a pretended security deposit, evidence of instances of similar but unconnected transactions with other persons, before and after the date of the offence charged, was admissible under ss. 14 and 15 of the Evidence Act, not to establish the *factum* of the offence but to prove that the transaction in issue was one of a systematic series of frauds, and that the intention of the accused on the particular occasion in question was dishonest and fraudulent[2].

Procedure.—Not cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Presidency Magistrate or Magistrate of the first or second class.

A criminal Court should not, save for very exceptional reasons, go behind the finding of a civil Court and convict of cheating a person who upon the very same facts has succeeded in satisfying a civil Court upon the merits of the case of the justice of his claim. Parties should not be encouraged to resort to the criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided by a civil Court[3].

Attempt to cheat.—In a prosecution on a charge of attempting to cheat a certain person, that person need not be the complainant[4].

Charge.—In the case of cheating the charge must set out the manner in which the offence was committed. Whether the words of the charge are reasonably sufficient to give the accused notice of the accusation which he has got to meet depends upon the circumstances of each particular case. The omission to state the manner of the cheating is regarded as material or not according as the accused has or has not in fact been misled by the omission and the omission has or has not occasioned a failure of justice[5].

The charge should run thus:

I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, (*set out the manner in which the cheating was committed*), and thereby committed cheating, an offence punishable under s. 417 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* High Court).]

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Where an accused person attempts to cheat a whole body of villagers and speaks to them in a body and not to each individual villager for the purpose, he may be tried on one charge for each attempt to get money from him[6]. There should be as many charges as there are persons cheated[7].

1 *Gokul Khatik*, (1924) 29 C. W. N. 483.
2 *Debendra Prasad*, (1909) 36 Cal 573, 9 C. L. J. 605.
3 *Bishan Das*, (1909) P. R. No. 33 of 1910.
4 *Mahadev Lal* v. *Dhonraj Maisri*, (1908) 12 C. W. N. 750.
5 *Kedarnath Chakravarti*, (1924) 41 C. L. J. 172.
6 *Johan Subarna*, (1905) 2 C. L. J. 618.
7 *Kailash Chandra Pal*, (1918) 46 Cal. 712.

418. Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound either by law, or by a legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect.

COMMENT.

[illegible] trustees, a solicitor, [illegible] *rd* in Malabar or by [illegible] It is the abuse of trust that is visited with severe punishment.

A Mahomedan, who represents himself to be a Hindu for the purpose of getting an employment with a Hindu, who would not employ a Mahomedan, commits an offence under this section[1]

False balance-sheets.—If the directors, manager and accountant, dishonestly, that is, to obtain wrongful gain for themselves or to cause wrongful loss to others, put before the shareholders balance-sheets which they knew to be materially false and misleading and likely to mislead the public as to the condition of the bank, and conceal its true condition and thereby induce depositors to allow their money to remain in deposit in the bank, they commit an offence under this section[2] But the mere fact that directors pass an incorrect balance-sheet is not sufficient to charge them with cheating The guilty knowledge of each director cannot be presumed from the fact that he authorises the issue of a balance-sheet containing false entries. The nature of false statements, the ease or difficulty with which their truth or falsity can be ascertained, the course of business of the company, and the position, experience and attainment of each individual director, are some of the circumstances that should be considered[3].

PRACTICE.

Evidence.—Prove (1) that the accused cheated some person (see s. 417).

(2) That he was under a legal obligation to protect the interest of that person.

(3) That the cheating had relation thereto.

(4) That the accused knew he was likely to cause wrongful loss to such person.

[illegible] when [illegible] –Triable [illegible] nd class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of ——, at——, cheated XY by doing an act, to wit——, with the *knowledge* that you were *thereby likely* to cause wrongful loss to the said XY whose interest in the transaction to which the cheating related you were bound either by law (*or* a legal contract) to protect, and that you thereby committed an offence punishable under s 418 of the Indian Penal C[illegible] and within my cognizance [*or* the cognizance of the Court of Session (*or* H[illegible] Court)].

[1] *Sherbaz*, (1903) 18 S L. R 59.

[2] *Moss*, (1893) 16 All. 88. See *Clifford*, (1913) 7 L. B. R. 143.

[3] *Seddon v. Loane*, (1910) 9 M. L. T. 20.

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment for cheating by personation.

419. Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

This section provides punishment for the offence described in s. 416.

PRACTICE.

Evidence.—Prove (1) that the accused cheated the complainant.

(2) That he did so by pretending to be some other person; or by knowingly substituting one person for another; or by representing that he, or some other person, is a person other than the person he really is.

Procedure.—Cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, pretending to be (*specify the person personated*) [*or* knowingly substituted A for B *or* represented that you or A were *so and so*)], and thereby committed an offence punishable under s. 419 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Cheating and dishonestly inducing delivery of property.

420. Whoever cheats and thereby[1] dishonestly[2] induces the person deceived to deliver any property[3] to any person, or to make, alter or destroy the whole or any part of a valuable security[4], or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

Simple cheating is punishable under s. 417. But where there is delivery or destruction of any property or alteration or destruction of any valuable security resulting from the act of the person deceiving, the proper section to apply is this section and not s. 417. Section 417 covers cases of cheating in which though there is fraud yet there is no intention of causing wrongful loss, or wrongful gain. The word 'fraudulently' is not used in s. 420.

1. **'And thereby'.**—These words do not imply that some further act of delivery is necessary after the offence of cheating is completed, for the offence of cheating is not complete unless the deception is effective. They are only designed to introduce a description of a particular sort of cheating, i.e., when the effect of cheating is to induce the delivery of property or the alteration or destruction of a valuable security[1].

[1] *Sanwaldas*, (1917) 11 S. L. R. 67.

2. **'Dishonestly'.**—See s. 24, *supra*. The word "dishonestly" implies a deliberate intention to cause wrongful gain, or wrongful loss, and when this is coupled with cheating the offence is punishable under this section[1]. The dishonest intention must either precede or accompany the act of dishonesty[2]. A young boy was married to a girl who was much older. The girl having grown up to womanhood, the mother and the elder brother of t[illegible]
girl to return certain ornaments which had [illegible]
marriage and thus put an end to the marria[illegible]
leading men, and in accordance with their advice the ornaments demanded were [illegible]

no dishonest inducement[3]. Two contracts were entered into between the complainant and the accused, one for the sale by the complainant of a certain number of shares of a particular kind and the other for the purchase by the complainant of certain shares of another kind. Subsequently, when the position between the parties was that the contract regarding the purchase by the complainant was either cancelled or so disputed that it could not be enforced except by litigation the [illegible] gave him back [illegible] against the [illegible] the amount less the loss sustained by him for the non-fulfilment of the other contract, it was held that the action of the accused was dishonest and fraudulent within the meaning of this section[4].

3. **'Deliver any property'.**—Property in this section refers only to moveable property[5]. 'Moveable property' is defined in s. 22, *supra* It includes money[6]. Whether an article is or is not 'property' does not depend upon its possessing a money or market value If it has some special value for the person or persons concerned, it is 'property' even though its value cannot be measured in money. A certificate of having passed an examination is therefore 'property' within the meaning of this section[7]. So is a promissory note The accused who had left certain promissory notes with the complainant as security for a loan, dishonestly induced him to return the promissory notes pretending that they were required to collect money from the debtors with the aid of which the complainant would be paid, but instead of doing so disposed of them and did not pay the complainant. It was held that the act of the accused in dishonestly inducing the complainant to return the same to him constituted cheating[8]. When property is delivered by means of cheating the offence falls under the first clause[9].

Delivery of money.—The accused falsely representing himself to be the manager of an estate induced one G to borrow some money and pay it to him as advance of security money to be deposited for a post promised by him to G. He then put off G from time to time and at length when he was found out, he promised to return the money. It was held that the offence of cheating was completed as soon as the accused obtained the money by a promise which he knew he could not fulfil. The fact that long afterwards the accused paid back under pressure a part of the money, did not in any way affect his criminality. The test of criminality is what was in his mind at the time when the money was given to him and whether

[1] *Ba Shein*, (1920) 13 B. L. T. 239
[2] [illegible]
[3] [illegible]
[4] [illegible] W. N. [illegible]
[5] *Abdul Ahad*, (1882) 2 A. W. N. 6
[6] *Birendra Lal Bhaduri*, (1904) 32 Cal. 22
[7] *Local Government v. Gangaram*, (1921) 18 N. L R. 52.
[8] *Venkatagurunatha Sastri*, (1923) 45 M L. J. 133, 17 L. W 580
[9] *Sadanund Doss*, (1865) 2 W. R. (Cr) 29, *Balaji*, (1875) Unrep Cr. C. 96.

he at that time intended to repay the same[1]. G, by falsely representing to L that G had been instructed by a competent authority to recruit unskilled labour for service in Africa and that G would, on payment of a certain sum of money as a fee for registering L's name, be able to engage L for service in that country, induced L to pay G the said fee, it was held that G had committed this offence[2]. Where an accused person had taken a ransom for the restoration of stolen property, and failed to return that property to the person who had paid him the ransom, it was held that he ought to be convicted of the more serious offence of cheating under this section[3]. The accused drew a hundi and borrowed money on it, without assuring himself that the drawee, with whom he had no previous dealings and who was not supplied with funds, would honour the same. The money so borrowed was spent by him on his own purposes. The hundi, when presented for payment, was dishonoured by the drawee. The accused, though apprized of the dishonouring, took no steps either to have the hundi honoured or to repay the money borrowed on the hundi; but made himself scarce. It was held that he was guilty of cheating under this section[4]. Accused adulterated saccharine with bicarbonate of soda and put the mixture into tins which he gave to a broker to sell. The broker sold the mixture as genuine saccharine and received money for it, which he made over to the accused. It was held that the accused was guilty of cheating and abetting that offence[5].

Suppression of facts.—Mere suppression of some facts at the time of borrowing money does not amount to cheating where there is no evidence of either active deception or dishonest or fraudulent action. So where a person mortgaged to another for Rs. 1,000 a mortgage executed in his favour of a house for Rs. 2,000 and also agreed that in case of his mortgagee not being able to recover his money from the mortgage rights he would make good the money from his other property, there is no element of cheating in that person's act even if he knew at the time of borrowing money that this mortgagor's title to the house was defective, and did not disclose this defect to his creditor[6].

Delivery of money under an immoral contract.—The accused agreed to let her daughter on hire to the complainant for concubinage for one year in consideration of Rs. 70, out of which she received Rs. 35 in advance. Later, she refused to carry out the contract or to return the advance. She was convicted of cheating. It was held, reversing the conviction, that a party to an immoral contract should not be allowed to prosecute on a criminal charge when he could not get performance of the contract in a civil Court[7].

Delivery of goods.—A person whose duty it was to ascertain and report the current rates in the market, by arrangement with persons in the market, reported rates higher than those really current, and in consequence of which higher rates were paid to sellers than they were entitled to, it was held that he had committed this offence[8]. Where the accused induced the complainant to deliver to him a bicycle under false representations that he was a commission agent and that the machine was required for an up-country purchaser, but after taking its delivery he negotiated its sale to a customer in Bombay, it was held that the offence of cheating and dishonestly inducing the delivery of property was complete as soon as this bicycle was handed over[9]. Where A went to an opium shop with B's ticket and explicitly or by implication represented himself to be B, thereby induced the shop-

1 *Debendra Prasad,* (1909) 36 Cal. 573, 9 C. L. J. 605.
2 *Girdhari Lal,* (1910) P. W. R. (Cr.) No. 26 of 1910.
3 *Nga Shan,* (1922) 1 B. L. J. 179.
4 *Uttamlal Narottamdas,* (1920) 23 Bom. L. R. 340, 6 Bom. Cr. C. 37.
5 *Bholasingh Amersingh,* (1924) 26 Bom. L. R. 211, 7 Bom. Cr. C. 139.
6 *Hari Kishan,* (1920) P. W. R. (Cr.) No. 40 of 1910.
7 *Jani Hira,* (1912) 14 Bom. L. R. 503, 1 Bom Cr. C. 148.
8 *Parmeshar Dat,* (1886) 8 All. 201.
9 *Banaji Framji Munshi,* (1900) 2 Bom. L. R. 621.

keeper to deliver to him a certain quantity of opium, it was held that A had committed the offence of cheating by personation; and as opium was actually delivered in consequence of the cheating, he should be convicted under this section[1]. The accused, by making a false representation that he was an employee of the Calcutta Municipal Corporation, obtained rupees ten as subscription from the Health Officer of that Corporation towards the funds of a charitable society. The money was duly made over by the accused to the charity, but he was subsequently charged with the offence of cheating and was convicted under this section. It was held [illegible]

ing was accompanied with a transfer of property[3].

Obtaining of a certificate.—A railway company offered some concession rates to student travellers, and a certificate was presented by somebody—not the accused—containing the names of students who had not applied for the certificate which the accused did not know and the endorsement of the railway official "may be issued" was made thereon, and the accused thereafter presented the same for the necessary pass to be issued The company issued the pass and arrested the accused It was held that the accused being himself entitled to travel at the reduced rate was not guilty of any fraudulent intent, no fraudulent intention could be assumed on the part of the accused to use the pass for persons not entitled to travel at the reduced rates and that as the company had not been defrauded the accused could not be convicted[4] A person who obtains a certificate from a Deputy Inspector of Schools by stating untruly that he passed the examination in a certain year, when another person of the same name did, acts fraudulently within the meaning of s. 415, and is guilty of an offence punishable under this section[5].

3. 'Valuable security'.—See s. 30, *supra*. A 'decree' does not come within the definition of a "valuable security": it merely declares the existence of legal rights or the extinguishment, extension, transfer or restriction of legal rights, etc.; the rights are there, etc., and all that the decree does is that it formally expresses the adjudication by the Court on the rights of the parties Therefore, a 'decree' is not a "valuable security", but even if a 'decree' did satisfy the definition of a "valuable security", there is no delivery of property. When the Court passes a decree, it does not deliver any property, because the original decree remains in Court, and the term "valuable securi[illegible]
and not to any copy of a decree [illegible]
parties. The same arguments would [illegible]
divorce is a valuable security. The complainant was taken to a village on the [illegible] for
[illegible] of
[illegible] be
[illegible] eed
[illegible] was
held that the offence committed came within the purview of this section and not s. 417[7].

An acknowledgment of receipt of an insured parcel is not a "valuable security". It is merely evidence that a parcel of some sort was delivered to the addressee and it cannot operate as a discharge of any liability. Where the accused,

1 *Nga Po Lu*, (1902) 1 L. B. R. 356
2 [illegible]
3 [illegible]
4 [illegible]
5 [illegible]
18 N. L. R. 52
6 *Charu Chandra Ghose*, (1923) 39 C. L. J. 122, 132, 28 C. W. N. 414, 422, 423.
7 *Bakhtawar Singh*, (1920) 3 L. L. J. [illegible]

in order to create false evidence that he had paid off a sum of Rs. 650, which he owed to complainant, filled a registered envelope with blank sheets of paper and posted it to the complainant after insuring it for Rs. 650, and the complainant gave an acknowledgment of receipt of the parcel to the Post Office on receiving the same, it was held that these facts amounted to an attempt to cheat[1]. This case has not been approved of by the Allahabad High Court[2], and the Calcutta High Court has also held that such an act does not amount to cheating[3].

Attempt to cheat.—The accused, having manufactured at home certain spurious trinkets, took them to a goldsmith, showed them to him, said they were of gold (which they were not), and that they were stolen property (which was also untrue), said he did not wish to sell them in the bazaar and said 'buy them'. The goldsmith did not buy and the negotiations went no further. It was held that he was guilty of an attempt to cheat[4]. The accused insured his mill and stock, which were burnt by fire. He thereupon made a claim on the basis that 75,040 baskets of paddy were stored at the time of fire. It was found that the mill godowns were not built to accommodate more than 15,000 baskets. It was held that the claim was not a mere exaggeration but was a false representation as to the quantity stored, that the accused having followed up the notice of the fire by actually sending in false claim papers his action must be regarded as an overt act towards the commission of the offence of cheating which had gone beyond the mere stage of preparation, and the accused was guilty of an attempt to cheat[5].

Abetment.—Where a person quick-silvered a double-pice so as to make it look like a rupee, and gave it to one K to get it changed, it was held that if the idea of using the coin as a rupee was an after thought he might be convicted under ss. 116 and 420 of abetting K to cheat the person to whom he was sent for change[6].

PRACTICE.

Evidence.—Prove the same points as those for s. 417, with the modification that the latter part of this section is confined to cases of cheating where the injury caused is the delivery of property, or the making, altering or destroying wholly or partially a valuable security, or making, altering or destroying anything signed or sealed which is capable of being converted into a valuable security[7].

Evidence of instances of similar but unconnected transactions with other persons, before and after the date of the offence charged, is admissible not to establish the factum of the offence but to prove that the transaction in issue was one of a systematic series of frauds and that the intention of the accused on the particular occasion in question was dishonest and fraudulent[8]. In a case of cheating, it is open to the prosecution to show that the acts charged against the accused were parts of a series of similar acts committed by him, or in which he was concerned, at or about the time in question. Evidence of such other acts, whether previous or subsequent to the frauds charged against the accused, is relevant for the purpose of showing whether or not the intention of the accused was honest or fraudulent. Evidence merely to prove that the accused's character is such that he is likely to commit the act with which he is charged is not admissible[9].

Procedure.—Cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

1 *Sadho Lal,* (1916) 1 P. L. J. 391.
2 *Tula Ram,* (1923) 21 A. L. J. 865.
3 *Raman Behari Roy,* (1923) 50 Cal. 849.
4 *Abdullah,* (1914) P. R. No. 14 of 1914. See *Billinghurst* v. *Blackburn,* (1925) 27 C. W. N. 821.
5 *Mg Po Hmyin,* (1923) 1 B. L. J. 1.
6 *Miharban,* (1883) P. R. No. 9 of 1884.
7 See *Kalipuddo Poramanick,* (1875) 23 W. R. (Cr.) 43.
8 *Debendra Prasad,* (1909) 36 Cal. 573, 9 C. L. J. 605.
9 *Girdhari Lal,* (1914) P. L. R. No. 269 of 1914.

When the facts charged indicate an offence under this section, a second class Magistrate should not try the accused under s. 417 by ignoring facts of aggravation[1].

Punishment.—Where an offender is convicted under this section, some [illegible] has a discretion to add or [illegible][2].

Charge.—It should state that the property obtained was the property of the person defrauded[3].

It should run thus:—

I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, cheated AB, by dishonestly inducing him to deliver——(*specify the property*) to you and which was the property of the said AB (*or* to make, alter, *or* destroy, the whole or any part of a valuable security *or* anything which is signed or sealed, and which is capable of being converted into a valuable security) and that you thereby committed an offence punishable under s. 420 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (or High Court)]

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge

Of Fraudulent Deeds and Dispositions of Property.

421. Whoever dishonestly[1] or fraudulently[2] removes, conceals or delivers to any person, or transfers or causes to be transferred to any person, without adequate consideration, any property, intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors.

COMMENT.

This and the three following sections deal with fraudulent conveyances referred to in s 53 of the Transfer of Property Act and the Presidency and Provincial Insolvency Acts (III of 1909, s 56, and V of 1920, s. 54.)

Object.—This section is intended to punish fraudulent debtors. It specially refers to frauds connected with insolvency. The offence under it consists in a dishonest disposition of property with intent to cause wrongful loss to the creditors. It is not necessary that the transferee should be privy to the fraud; but want of bona fides on the part of the transferee is necessary under civil law.

When a debtor with bankruptcy impending pays a creditor in the honest belief on reasonable grounds that he is legally bound to make the payment, it is not a fraudulent preference, even though the debtor is in fact under no legal obligation to make the payment[4].

Scope.—The section covers *benami* transactions in fraud of creditors[5].

This section applies to property both moveable and immoveable.

1. 'Dishonestly'.—See s. 24, *supra*.

[1] *Setti Rangayya* v. *Somappa*, (1924) 20 L. W. 919.

[2] *Williams*, (1862) 1 M. H. C. 31.

[3] *Durga*, [1929] A. L. J 400

[4] *Vaulin; Saffery*, [1900] 2 Q. B. 325

[5] *Abdul Gani Suleman*, (1899) P. J L. R. 93.

2. **'Fraudulently'.**—See s. 25, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused removed, concealed, or delivered the property; or that he transferred it or caused it to be transferred to some one.

(2) That such transfer was without adequate consideration.

(3) That the accused thereby intended to prevent, or knew he was thereby likely to prevent, the distribution of that property according to law among his creditors, or creditors of another person.

(4) That he acted as above dishonestly or fraudulently.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Jurisdiction.—The Magistrate's jurisdiction to entertain a complaint under this section is not taken away by the provisions of s. 103 of the Presidency Towns Insolvency Act, III of 1909[1], or the Provincial Insolvency Act, V of 1920, s. 69[2]. The Magistrate's jurisdiction to try the insolvent under this section and s. 424 even after the death of the complainant is not taken away by the Presidency Towns Insolvency Act[3].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, dishonestly (*or* fraudulently) removed (*or* concealed, *or* delivered to a certain person, to wit——, without adequate consideration) certain property, to wit—, intending thereby to prevent or knowing it to be likely that you would thereby prevent the distribution of the said property according to law among your creditors (*or* the creditors of——); and that you thereby committed an offence punishable under s. 421 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Dishonestly or fraudulently preventing debt being available for creditors.

422. Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being made available according to law for payment of his debts or the debts of such other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section, like the preceding one, is intended to prevent the defrauding of creditors by masking property. Any proceeding to prevent the attachment and sale of debts due to the accused will fall under it. The offence consists in the dishonest or fraudulent evasion of one's own liability.

CASES.

Where A entered into an agreement with B not to compromise a case with C, because he had assigned the benefit of the suit to B as a security for the due payment of an instalment of money and A notwithstanding did afterwards compromise the suit with C, it was held that A could not be convicted under this section unless the compromise was made dishonestly or fraudulently towards B[4]. The

1 *Mulshanker Harinand Bhat*, (1910) 35 Bom. 63, 12 Bom. L. R. 750.

2 *Segu Baliah* v. *N. Ramasamiah*, (1917) 6 L. W. 283.

3 *U. Mo Gaung* v. *U. Po Sin*, (1928) 6 Ran. 664.

4 *Nobin Chunder Mudduck*, (1874) 22 W. R. (Cr.) 46.

accused's estate was under mortgage and in the management of certain persons under certain conditions as to payment of moneys realised by them. In execution of a decree obtained by the managers in a suit brought by them in the name of the accused, a certain under-tenure was sold for Rs. 3,000. The judgment-debtor arranged with the accused that on payment of Rs. 1,000 the sale should be set aside and he accordingly paid that sum into Court, and an application was made by the accused to draw out the money upon which no order was made. They were, thereupon, convicted, at the instance of the managers, of an attempt to commit an offence under this section. It was held that the application to obtain the money paid into Court might have been a breach of their contract with the mortgagors, but such conduct would not necessarily be regarded as dishonest or fraudulent so as to render the accused liable to punishment, their attempt to get the money being more to put an end to the management than to prevent money from being available for the payment of their debt under the mortgage[1]

PRACTICE.

Evidence.—Prove (1) that the debt or demand was due to the accused, or some other person.

(2) That the accused prevented such debt or demand from being made legally available for his debts, or for the debts of another person

(3) That he did as above dishonestly or fraudulently

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class

Dishonest or fraudulent execution of deed of transfer containing false statement of consideration.

423. Whoever dishonestly[1] or fraudulently[2] signs, executes or becomes a party to any deed or instrument[3] which purports to transfer or subject to any charge any property, or any interest therein, and which contains any false statement relating to the consideration for such transfer[4] or charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section deals with fraudulent and fictitious conveyances and trust. If the consideration for the sale of immoveable property is, with the consent of the purchaser, exaggerated in a deed of sale in order to defeat the claim of the pre-emptor, the purchaser will be guilty of this offence[2]. In such cases it is necessary to prove the existence of a right of pre-emption in respect of the subject matter [illegible] to such a right[3]. [illegible] l will be punish- [illegible] a maintenance of a charge in a criminal Court for this offence[4].

1. **'Dishonestly'.**—See s. 24, *supra*.

[1] *Hara Kumary Chowdhurani* v. *R. Savi*, (1900) 28 Cal. 314.

[2] *Gurditta Mal*, (1901) P. R. No. 10 of 1902; *Lachman Das*, (1907) P. R. No. 16 of 1907; *Mahabir Singh*, (1902) 25 All. 31.

[3] *Chhajju*, (1907) P. R. No. 16 of 1908

[4] *Umrao Singh*, (1883) 3 A. W. N. 209.

2. **'Fraudulently'.**—See s. 25, *supra*. This word does not connote deprivation of property. It is not essential that the person deceived or to be deceived should be the same as the person injured or intended to be injured[1].

3. **'Any deed or instrument'.**—A *kabuliat* is not a document contemplated under this section. Although a *kabuliat*, when accepted, operates as a lease for some purposes, it is not a document which purports to transfer or subject to any charge any property or any interest therein[2].

4. **'False statement relating to the consideration for such transfer'.**—The law does not make punishable every false statement in an instrument of transfer. The false statement in order to become criminal must relate to the consideration or to the person to be benefited by it. The word 'consideration' cannot mean the property transferred. A statement that the vendee purchased the whole land while the vendor could only sell part of it, is not one coming under this section[3]. Where an accused person had unsuccessfully sought to obtain a woman in marriage and thereafter made and registered an agreement in her favour falsely reciting that he had married her, and purporting to convey to her a plot of land in lieu of her dower, it was held that he had an intention to cause injury to her and her husband, and to support his own false claim to that status, and that he was guilty under this section[4].

PRACTICE.

Evidence.—Prove (1) that the accused signed, executed, or became a party to the deed, or instrument in question.

(2) That the purport of such document was to transfer, or to subject to a charge, the property or any interest in question.

(3) That such document contained a false statement relating to the consideration, or relating to the person for whose use or benefit it was really intended to operate.

(4) That the accused did as above dishonestly or fraudulently.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Dishonest or fraudulent removal or concealment of property.

424. Whoever dishonestly or fraudulently conceals or removes any property of himself or any other person, or dishonestly or fraudulently assists in the concealment or removal thereof, or dishonestly releases any demand or claim to which he is entitled, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section provides for cases not coming within the purview of ss. 421 and 422. It contemplates such a concealment or removal of property from the place in which it is deposited, as can be considered dishonest or fraudulent, whether the fraud is intended to be practised on creditors or partners[5].

[1] *Legal Remembrancer* v. *Ahi Lal Mandal*, (1921) 48 Cal. 911.
[2] *Mohammad Kajim Ali* v. *Jorabdi Naskar*, (1919) 46 Cal. 986.
[3] *Mania Goundan*, (1911) 37 Mad. 47.
[4] *Legal Remembrancer* v. *Ahi Lal Mandal*, sup.
[5] *Gour Benode Dutt*, (1873) 21 W. R. (Cr.) 10.

CASES.

Removal by a partner.—Where one of the several partners removed the partnership books at night, and when questioned denied having done so, this offence was held to have been committed[1].

Removal [illegible]—[illegible] re a judgment-debtor, [illegible] attachment was in [illegible] where the accused is not a judgment-debtor and has grown the crops which he contended could not be legally attached, he cannot be convicted under this section for harvesting them[3].

Removal unc[illegible]— [illegible] violation of an order, [illegible] constitute this offence [illegible] offence under this section[5].

Removal of crops by tenants.—Where ryots holding land on *varam* tenure removed crops for the purpose of protecting them from injury or damage owing to delay or refusal on the part of the Zemindar to perform his part in harvesting or division, it was held that such a removal was not dishonest. But where it was proved that the crops had been removed dishonestly or fraudulently, it was *held that this offence was committed, even though the Zemindar, under the terms* of the tenancy, acquired no property in the share due to him until the ryots had delivered it to him[6]. Similarly, where the accused who was a ryot under the Madras Estates Land Act and who was bound to share the produce of his land with the landholder in a certain proportion, dishonestly concealed or removed the produce, thus preventing the land holder from taking his due share, it was held that the accused was guilty under this section apart from the provisions of the Madras Estates Land Act[7].

Removal during bona fide dispute—Where the accused was convicted under this section, for dishonestly removing certain property from a shop upon which were the padlocks of two widows and it appeared that he removed the property at the instance of the widow who claimed to be entitled to the whole of it, it was held that if eventufully it be decided that the other widow was not entitled to a share in the property, it would follow that the accused's action in removing the property from the locked shop was not a dishonest one within the meaning of this section[8].

PRACTICE.

Evidence.—Prove (1) that the accused concealed or removed the property, [illegible] in question.

(2) That he released the same.

(3) That he did so dishonestly, or with intent to defraud

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

1 [illegible]

2 [illegible] Kar[illegible] Gou[illegible] (189[illegible]

3 *Sohan Mundari*, [1929] Cr C. (Pat) 280.

4 *Baburi Magata*, (1882) 1 Weir 483; *Ananda Muttusami Aiyan*, (1883) 1 Weir 484

5 *Gopalasamy*, (1902) 25 Mad. 729.

6 *Subudhi Rantho v. Balarama Padi*, (1902) 26 Mad. 481.

7 *Sivanupandia Thevan*, (1914) 38 Mad. 793; *Kuldip Panday*, (1916) 1 P. L. J. 353; *Lalu Gope*, (1917) 1 P. L. W. 691.

8 *Khushi Ram*, (1920) 3 L. L. J. 99, P. W. R. (Cr) No. 6 of 1921

The legality or formality of the mode of attachment allowed by a civil Court is not a matter for a Deputy Magistrate's consideration[1]. Civil rights are not to be disposed of in criminal Courts[2].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, dishonestly (*or* fraudulently) concealed (*or* removed) a certain property, to wit——, belonging to yourself (*or* to——) [*or* dishonestly or fraudulently assisted in the concealment or removal thereof; *or* dishonestly released a certain demand, to wit——] and that you thereby committed an offence punishable under s. 424 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Of Mischief.

Mischief.

425. Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person[1], causes the destruction of any property or any such change in any property[2] or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously[3], commits "mischief".

Explanation 1.—It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2.—Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

ILLUSTRATIONS.

(*a*) A voluntarily burns a valuable security belonging to Z intending to cause wrongful loss to Z. A has committed mischief.

(*b*) A introduces water into an ice-house belonging to Z, and thus causes the ice to melt, intending wrongful loss to Z. A has committed mischief.

(*c*) A voluntarily throws into a river a ring belonging to Z, with the intention of thereby causing wrongful loss to Z. A has committed mischief.

(*d*) A, knowing that his effects are about to be taken in execution in order to satisfy a debt due from him to Z destroys those effects, with the intention of thereby preventing Z from obtaining satisfaction of the debt, and of thus causing damage to Z. A has committed mischief.

(*e*) A, having insured a ship, voluntarily causes the same to be cast away, with the intention of causing damage to the underwriters. A has committed mischief.

(*f*) A causes a ship to be cast away intending thereby to cause damage to Z, who has lent money on bottomry on the ship. A has committed mischief.

(*g*) A, having joint property with Z in a horse, shoots the horse, intending thereby to cause wrongful loss to Z. A has committed mischief.

(*h*) A causes cattle to enter upon a field belong to Z, intending to cause and knowing that he is likely to cause damage to Z's crop. A has commited mischief.

1 *Brojo Kishore Dutt,* (1867) 8 W. R. (Cr.) 17. 2 (1868) 1 Weir 483.

426. Whoever commits mischief shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Punishment for mischief

COMMENT.

The section deals only with a physical injury from a physical cause[1].

Ingredients.—This section necessitates three things[2].—

1 Intention or knowledge of likelihood to cause wrongful loss or damage to the public or to any person

2. Causing the destruction of some property or any change in it or in its situation.

3. Such destruction or change must destroy or diminish its value or utility or affect it injuriously.

1. 'Intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or any person'.—As to the meaning of 'wrongful loss', see s 23, *supra*; and of 'public', see s. 12, *supra* The Bombay High Court in an old case said that the gist of this offence lay in the intention[3] But in a subsequent case it has held that the terms of the section are, however, satisfied when there is a distinct finding on the question of the accused's knowledge, and the question of intention is material only as regards the sentence[4] This is a correct view

The offence of mischief imports an act done wilfully and not merely negligently[5].

This section does not necessarily contemplate damage of a destructive character. It requires merely that there should be an *invasion of a right*, and diminution of the value of one's property, caused by that invasion of right, which must have been contemplated by the doer of it when he did it[6] The damage need not, necessarily, consist in the infringement of an existing, present, and complete right, but it may be caused by an act done now with the intention of defeating and rendering infructuous a right about to come into existence (*vide* ill. (*d*).) Any person who contracts to purchase property, and pays in a portion of *the purchase-money, has such an interest in that property, although his title may* not be complete, or his right final and conclusive, that the destruction of such property may cause to him wrongful loss or damage within the meaning of this section[7]. The probable consequential damage to other property would not of itself constitute mischief[8].

Cases.—Wrongful loss or damage is necessary.—The accused's premises, adjoined a public road on the opposite side of which there grew a chestnut tree, which overhung the road to within a few feet of the accused's premises. The accused cut off certain portions of the tree, contending that he had a right to do so in order to protect his property from the nuisance caused by stones which boys threw at the blossoms and by the branches interfering with the entrance of light and air [illegible]

1 [illegible] (1901) 24 All 155 156
2 [illegible] 1874) 7
3 [illegible] 901) 8
4 [illegible] 1894, Unrep Cr. C 690

5 *Abdullah*, (1911) 5 S L R. 263.
6 *Juggeshuar Dass* v. *Koylash Chunder Chatterjee*, (1885) 12 Cal 55
7 *Dharma Dass Ghose* v. *Nusseruddin*, (1886) 12 Cal 660
8 (1868) 4 M H C. App. 15
9 *Hamilton* v *Bone*, (1898) 16 Cox 437.

done amounted to mischief and it was no defence to say that their motive in doing it, namely, to free their fields from water, was an innocent one[1]. After driving a cow out of his master's field the accused threw at her two stones one of which fractured her leg. It was held that he was guilty of mischief under this section. If the animal had been maimed or rendered useless the conviction would be under s. 428[2]. The accused dug a trench in his own land but alongside of a wall belonging to the complainant and removed the lateral support of the wall so as to cause the wall to tumble down. The complainant had not acquired lateral support for his wall by prescription. It was held that the accused in digging a trench and thus removing such support could not be said to have an intention to cause "wrongful loss" to the complainant as the means adopted by him to cause the loss were not "unlawful"[3]. Over the *chabutra* of a mosque, there was an image of a Hindu god. It was surrounded by a wall which belonged to the Mahomedan community. Accused, a Hindu, widened the doorway in the wall by demolishing a portion of it on either side of the door. It was held that he was guilty of mischief[4].

Destruction by the owner of premises of a trespasser's property found thereon.—The owner of land has no right to destroy the property of a trespasser found upon the premises. The complainant obtained possession of certain land as tenant of the accused, D, and after the term of his lease had expired, he was left in possession by D who took no steps to evict him. But when the complainant attorned to one B as landlord, D, who was litigating with B, forcibly and wantonly destroyed the earthen pots and put out of order a water-wheel of the well from which the complainant watered the crop raised by him on the land in dispute. It was held that the damage caused by D amounted to mischief. Batty, J., said: "The applicant's pleader, I understand, is unable to contend that if a trespasser left his watch in the room of another person, that would justify that other person in smashing the watch or throwing it down a well"[5]. The accused, who had a right of way for his carts across the fields of the complainants, was prevented from exercising his right by the complainants erecting dams in their fields. The accused obtained an injunction restraining the complainants from interfering with the accused in the exercise of his right. The complainant failed to comply with the injunction. The accused, instead of enforcing the injunction in the usual way, himself proceeded to the complainants' fields and had the dams demolished. It was held that the accused was guilty of mischief, for the loss to the complainants was caused by unlawful means adopted by the accused in taking the law into his own hands and abeting the nuisance contrary to the provisions of s. 36 of the Indian Easements Act 1882[6].

Accident.—Where the accused who were employed in floating timber through a bridge, struck the arch of the bridge with some of the logs, it was held that this offence was not committed[7].

No mischief if no wrongful loss or damge is caused to the public or to any person or if act amounts only to an invasion of a civil right.—Where the accused cut down crops planted by the complainant on land to which he had no right whatever[8]; where the accused was found catching fish in a public river, the right of fishing in which was let out by Government to another but no fencing was put up to shut up the fish in any manner[9]; where the servant of a person pulled down a building which a civil Court had declared ought not to have been erected[10]; where

1 *Chulhan* v. *Ahir*, (1908) 16 C. W. N. 263.
2 *Mahadeo*, (1916) 12 N. L. R. 188.
3 *Athi Ayyar*, (1920) 14 L. W. 728.
4 *Mahadeo Singh*, (1926) 27 Cr. L. J. 898
5 *Dinkar Chintaman Patkar*, (1904) 7 Bom. L. R. 86, 87.
6 *Zipru Tanaji Patil*, (1927) 51 Bom. 487, 29 Bom. L. R. 484, 9 Bom. Cr. C. 59.
7 (1870) 5 M. H. C. App. 40.
8 *Nga Si*, (1903) 10 Burma L. R. 126.
9 *Bhagiram Dome* v. *Abar Dome*, (1888) 15 Cal. 388; *Bakar Halsana* v. *Dinobhandhu Biswas*, (1869) 3 Beng. L. R. (A. Cr. J.) 17.
10 *Rajcoomar Singh*, (1872) 3 Cal. 573.

a person innocently removed a barricade placed by a Municipality on a piece of land in front of his house which impaired his ingress and egress to or from his house[1]; where an agent of a landlord accompanied by a bailiff broke open the door of a room, in his chawl, in the possession of his tenant, in execution of a distress warrant

his land was a civil trespass, destroye
Municipal Committee permitted a tree
purposes against the orders of the Municipal Committee as a body[5], where persons took cattle to a pound whereby their owners were subjected to a fine[6], where the reversioner of a mortgagor sold some of the bricks of the mortgaged house, which had tumbled down[7]; where a person dug out tombs of the forefathers of the complainant which stood on his own lands[8]; and where the accused, members of the public, in bona fide exercise of their right of way, pulled down a wall obstructing a public way which was built by the complainant[9], it was held in all these cases that this offence was not committed.

The fact that for years a deity was allowed to be brought once a year underneath a tree standing on the land of the accused for public worship, was not sufficient to divest the onwer of the land, and of the tree standing thereon of his ownership and not to amount to a dedication of the tree to the deity or the public, and the accused, who cut the tree, was therefore not guilty of mischief[10]. Where the accused, a servant of one R, acting solely in the interests of his master, removed or damaged some bamboos which belonged to the estate of his master which was under the management of the Court of Wards, it was held that the act of the accused did not amount to this offence inasmuch as by his act no wrongful loss was caused to anybody, not even to the Court of Wards. The Court said: "It is a well-known rule of law that a man may commit mischief by damaging his own property, provided he does so in order to cause wrongful loss to somebody else, or knowing it to be likely to cause wrongful loss to somebody else. But it can hardly be said that a man who damages his own estate, although he has at present only a qualified interest, damages the trustees in possession, whose only object is to preserve the estate for the benefit of the owner[11]".

2. 'Causes the destruction of any property or any such change in any prope[illegible]
destructio[illegible]
utility S
serviceabl[illegible]
fire, but it is not mischief, though it may be theft, to eat the food. Where some graziers grazed goats without the necessary permit no offence was held to have
[illegible] troy it, or
. Cutting
of a tree[15]

[1] *Abdul Aziz*, (1895) Cr. R. No. 10 of 1895, Unrep Cr C. 745.

[2] *Kaikhusro Cursedji*, (1898) Unrep Cr C. 949.

[3] *Govinda Punja*, (1884) 8 Bom. 295.

[4] *Shankar Lal*, (1887) 7 A W. N. 101; *Rustam Ali*, (1882) 2 A. W. N. 209.

[5] *Amir Chand*, (1877) P. R No. 9 of 1878.

[6] *Ramjiawan*, (1881) 1 A. W. N. 158.

[7] *Bhuban Mohan Banerjee* v. *Tansuk Roy Seraogi*, (1901) 6 C. W. N. 34.

[8] *Chotually*, (1902) 4 Bom. L. R 463, but see contra, *Rumala Nogayya*, (1889) 1 Weir 496

[9] [illegible]

[13] *Mahomed Foyaz* v. *Khan Mahomed*, (1872) 18 W R. (Cr) 10. See *Miraz Chowkidar*, (1903) 7 C. W. N. 713

[14] *Shakur Mahomed* v. *Chunder Mohun Sha*, (1874) 21 W. R (Cr.) 38.

[15] *Sardar Singh*, (1917) 19 Cr. L. J. 339: contra, *Muhammad Hasan*, (1927) 29 Cr. L. J. 275.

does not amount to mischief. Walking across a field of long grass is causing damage to the grass[1]; making a breach in the wall of a canal is an act which causes such a change in the property as destroys or diminishes its value or affects it injuriously and therefore amounts to mischief[2]. The section contemplates a physical injury from a physical cause. Certain Hindus present at a caste dinner had sat down to partake of the food which had been served to them, when certain other members of the caste came, and, after telling those who were seated to move to another place which they refused to do, threw down a shoe amongst the men who were seated. The persons who threw the shoe were convicted of mischief inasmuch as their action had polluted the food, and had, from a Hindu religious point of view, rendered it unfit to be eaten. It was held that they were not guilty of mischief[3]. Where the accused, a landlord, omitted to give electric light to the complinant, his tenant, by not switching on the light, it was held that this did not amount to mischief as it did not involve a change in the property[4].

The accused threw large pieces of brick at the back of the complainant's house, complainant being at the time on the ground in front of the house and there being no one in the house. It was held that the accused was guilty of mischief because roofs and walls of dwelling houses were not put up to be pelted at with brick-bats and their owners had a right to be protected from even hurts and marks being made in and on them without their consent[5].

'Property' means some tangible property capable of being forcibly destroyed, but does not include an easement. The accused with intent to cause wrongful loss or damage to the complainant caused the destruction of certain stairs. The Magistrate found that the accused was the owner of the stairs but that the complainant had the right to use them, and convicted the accused. It was held, quashing the conviction, that even assuming such an easement existed it could not be considered 'property' within the meaning of this section[6].

The mischief must be done to the property belonging to another person, but where a person's right is declared by a civil Court, he commits no mischief by damaging the property[7].

Where the accused on receiving delivery of a registered article from a village branch postmaster was requested to sign an acknowledgment for the article received by him, but instead of returning the same duly signed he tore it up and threw it on the ground, it was held that the accused was guilty of mischief. The Court said: "The act of tearing is an act of mischief, and the postal receipt is the property of the post office, which has some value, however small. The tearing of such a receipt causes damage to the post office, that is wrongful loss to it, and ...there can be no question that the accused is liable under s. 426...for his act"[8]. The destruction of a document evidencing an agreement void for immorality constitutes this offence as it can be used as evidence for other collateral purposes[9].

In a Collectorate partition a certain building which was in the possession of the complainant fell to the share of one A. Subsequently, there was a compromise between A and the complainant whereby the former agreed to give up the building to the latter in exchange of a plot of land. This compromise was filed before the Collector who gave effect to it in the Collectorate partition. Complainant continued in possession of the building. Accused, a servant of A, along with others, demolished the building and ploughed up the site asserting that the building belonged to his master A and that the compromise was ineffective as no deed of exchange had been drawn up in accordance therewith. It was held that the compromise having been given effect to by the Collector in the partition the title to the building had passed to the complainant, and that the accused was, therefore, guilty of mischief[10].

1 *Gayford* v. *Chouler*, [1898] 1 Q. B. 316.
2 *Bansi*, (1912) 34 All. 210.
3 *Moti Lal*, (1901) 24 All. 155.
4 *Abdul Rahman*, (1927) 28 Cr. L. J. 960, 22 S. L. R. 393.
5 *Ma Nyein Gale* v. *Nga Sein*, (1909) 5 L. B. R. 100, F.B.
6 *Keru*, (1888) Unrep. Cr. C. 387.
7 *Jang Bahadur Singh*, (1925) 7 P. L. T. 79.
8 *Sukha Singh*, (1905) P. R. No. 24 of 1905.
9 *Vyapuri*, (1882) 5 Mad. 401.
10 *Tanak Chaudhry*, (1923) 24 Cr. L. J. 542.

'**Change**' means physical change in composition or form. A change in value is not sufficient to constitute mischief.

3. 'Destroys or diminishes its value or utility, or affects it injuriously'.—It is highly essential that the property regarding which the offence is alleged to have been committed must have been destroyed or its value or utility must have been diminished. In the latter case it is not said to what extent the value or utility must have been diminished But there mut be some appreciable diminution; otherwise s. 95 will apply It is not essential that the property interfered with should belong to the person injuriously affected See Explanation 1. Illustrations (*e*) and (*f*) exemplify this explanation.

D, as lessee of Government, held rights of fishery in a particular stretch of river. C, by diverting the water of that river, converted the bed of the river for a considerable distance into dry land, or land with a very shallow covering of water upon it, and by so doing he was enabled to destroy, and did destroy, very large quantities of fish, both mature and immature. It was held that when C deliberately changed the course and condition of the river in the manner described to the

[illegible] ıself with [illegible] loss or [illegible] (*g*) shew [illegible] on 2. In order, however, to his doing so, it is necessary that he intends to cause wrongful loss to some person, as in the cases stated in the illustrations. If a person destroy [illegible]

Bona fides.—"If a person deals injuriously with property in the bona fide belief that it is his own he cannot be convicted of the offence of mischief, because his act was not committed with intent to cause *wrongful* loss or damage to any person. But the mere assertion of a claim of right is not in itself a sufficient answer to such charges. It is the duty of the criminal Court to determine what was the intention of the alleged offender, and if it arrives at the conclusion that he was not acting in the exercise of a bona fide claim of right, then it cannot refuse to convict the offender, assuming of course that the other facts are established which constitute the offence"[4]. Where, therefore, a person cut trees on land which he claimed, but possession of which, after an execution sale, had been legally made over to another person without any objection or formal intervention on his part, it was held that he had committed mischief[5]. But where the accused cut the branches of a tree regarding which there was a dispute it was held that he was not guilty[6]. Where a raiyat surrendered his holding to the landlord who took possession of the land dispossessing an under-raiyat who had been brought on the land by the raiyat and

[1] *Chanda*, (1905) 28 All 204.

[2] *Dharma Dass Ghose* v. *Nusseruddin*, (1886) 12 Cal. 660.

[3] M. & M. 392.

[4] Per Turner, J., in *Budh Singh*, (1879) 2 All. 101, 103; *Keru*, (1888) Unrep Cr. C [illegible] *Jagannathan*, (1893) 1 Weir 490; *James*, (1837) 8 C. & P. 131; *Joshua Matthews*, (1876) 14 Cox 5, *Manikka Veera Raghava Chariar*, (1910) 8 M. L T. 246; *Kondi Chetty*, (1910) 8 M. L. T. 385; *Talebar Chowdhry*, (1917) 18 Cr. L. J. 750, 2 P. L. W. 49; *Gainu Panday*, (1921) 2 P. L T. 394; *Veeraswami*, [1929] Cr. C. (Mad.) 481.

[5] *Sonai Sardar* v. *Bukhtar Sardar*, (1876) 25 W. R. (Cr.) 46. See also *Dharma Das Ghose* v. *Nusseruddin*, sup

[6] *Sardar Singh*, (1917) 4 P. L. W. 291; *Sham Lal Lohar*, (1918) 5 P. L W. 114; *Sarat Chandra Sen* v. *Yakub Taluqdar*, (1923) 28 C. W. N. 736.

uprooting the seeds sown by the under-raiyat, it was held that, under the Chota Nagpur Tenancy Act, after surrender the position of the under-raiyat was that of a trespasser and the action of the landlord being a bona fide claim of right, he was not liable for criminal trespass and mischief[1].

Where, in the bona fide assertion of a right, a wall was pulled down, it was held that the act did not amount to mischief and the dispute between the parties was one for settlement by a civil Court[2]. Where, in the exercise of a bona fide claim of right to bury a deceased person, the members of a congregation broke open the gate of a graveyard which they believed was wrongfully closed against them by a priest, it was held that they had committed no offence[3]. The accused who were servants of S were convicted by a Magistrate under this section and s. 143 for having cut a channel from a *jhil* which was in the possession of B and by so doing let water and fish from the *jhil*. The Magistrate had found that the land adjoining the *jhil* across which the channel had been cut had been in the possession of S. On appeal, it was contended that the accused had a perfect right to make the cutting in their master's land. It was held that though they had that right, it did not follow that they had a right to extend the cutting beyond and through the bank of the *jhil*, which, with the *jhil* itself and the land underneath the water, were in the possession of B, and the conviction could not be set aside on that ground[4]. A gamekeeper was prosecuted for unlawfully and maliciously killing a dog which was at the time near an aviary in which pheasants, the property of the appellant's master, were confined for breeding purposes. It was held that he was not liable if he acted under the bona fide belief that what he was doing was necessary for the protection of his master's property[5].

Negligence is not mischief.—Where the accused set fire to a heap of rubbish in his own field, and a gust of wind came and carried the flame to an adjacent forest and burnt it, it was held, on the analogy of cases of alleged mischief done by straying of cattle, that the facts did not at the outside show more than "mere neglect or carelessness" on the part of the accused to keep the fire from straying into the forest, and that the "neglect or carelessness" was not sufficient to constitute the offence of mischief[6]. Where the accused whilst driving his bullock cart pulled the bullock in the wrong direction and thereby dashed the pole of his yoke against the footboard of the complainant's carriage and caused damage, it was held that the accused was not guilty of mischief[7].

Master not liable for the negligence of his servant.—An owner who lived elsewhere could not, in the absence of express malice, be held criminally liable for the negligence of his contractor in digging the foundations of a house then being built without proper precautions[8].

Cattle.—In the case of mischief done by straying of cattle, mere neglect or carelessness on the part of the owner or cattle to keep them from straying into fields of others is not sufficient[9]. To warrant a conviction it must be proved that he actually and wilfully caused the cattle to enter, knowing that by so doing he was likely to cause damage[10], or at least that he was present and able to restrain the animal

1 *Har Prasad Singh* v. *Hulsan Chamar*, (1928) 9 P. L. T. 728.

2 *Jagannathan*, (1893) 1 Weir 490; *Balkrishna Narhar Velhankar*, (1924) 26 Bom. L. R. 978, 7 Bom. Cr. C. 221.

3 *Viagula Fernandez Vas*, (1891) 1 Weir 489.

4 *Shoshi Bhushan Bose* v. *Gobind Chandra Roy*, (1903) 7 C. W. N. 663.

5 *Miles* v. *Hutchings*, [1903] 2 K. B. 714.

6 Per Russell, Ag. C. J., and Heaton, J., (Aston, J., dissenting), in *Nandeyappagowda*, (1906) 8 Bom. L. R. 851, 854.

7 *Thornotti Madathil Poker*, (1886) 1 Weir 495.

8 *Srish Chandra Sircar*, (1918) 17 A. L. J. 343.

9 *Narsu*, (1882) Unrep. Cr. C. 185; *Rangu*, (1883) Unrep. Cr. C. 189, Cr. R. April 19, 1883; *Hyderally*, (1884) Unrep. Cr. C. 199; (1871) 6 M. H. C. App. 36.

10 *Araz Sircar*, (1868) 10 W. R. (Cr.) 29; *Forbes* v. *Grish Chundra Bhuttacharjee*, (1878.) 6 Beng. L. R. App. 3, 14 W. R. (Cr.) 31; *Bai Baya*, (1882) 7 Bom. 126; *Shaik Raju*, (1884) 9 Bom. 173; *Mehdi Hasan*, (1907) 29 All. 565.

from causing damage and did not restrain it from so doing[1]. The prosecution is bound to show that there was an intention to cause wrongful loss or damage.

ot properly provided
nally omit to secure
r care and custody,
r, must be such as
a chain of facts from
Where the accused grazed their cattle on waste lands on which the Government had by notification prohibited the public from grazing cattle, when provision was made for the public grazing their cattle elsewhere, this offence was held to have been committed[3].

garden, it was held that he was not guilty of mischief The act to be criminal should be done with dishonest intention[5].

Statutory application.—The Madras Pier Act (Madras Act V of 1863), s. 7.

PRACTICE.

Evidence.—Prove (1) that the accused caused the destruction of some property, or some change in such property or in the situation thereof

(2) That the above act destroyed or diminished the value or utility of such property, or affected it injuriously.

knowing that he was likely

as wrongful.

Onus.—It is for the prosecution to prove that the accused caused damage with a wrongful intent—with a knowledge that he was not justified in doing it, and that the party under whose orders he was acting had no real title[7].

Where, in a case regarding mischief to land, the defence raises a bona fide plea of right to the land, the Magistrate should determine whether the accused acted with any such intent as made his act criminal, viz., any such intent as is mentioned in this section[8].

hen the by any

Warning to Magistrate.—The authority vested in the criminal Court of punishing persons for acts of mischief is one which must be exercised with great caution, and it must be very clear, before conviction, that the accused has brought himself within the true meaning of s 425, otherwise this provision of the law will be frequently resorted to as a trenchant mode of deciding disputed civil questions of rights[9].

Conviction for mischief as well as for theft.—It is not illegal to convict the accused of mischief as well as of theft. Where, therefore, the accused had cleared a piece

(1928) 52 Mad 151.

5 *Ghazi*, (1904) P R No. 23 of 1904 See *Joti Babu*, (1906) 8 Bom L R. 549

6 *Denoo Bundhoo Biswas*, (1869) 12 W. R. (Cr.) 1; *Kashi Nath Ghose* v. *Dinobundhoo Mytee*, (1871) 16 W. R. (Cr) 62 [72]; (1881) 1 Weir 488.

7 *Issur Chunder Mundle* v. *Rohim Sheil*, (1876) 25 W. R (Cr) 65.

8 *Mahadshet*, (1889) Unrep Cr. C. 432.

9 *Ram Golam Singh*, (1866) 6 W. R. (Cr.) 59

of Government land, cutting down and appropriating the trees thereon without permission, it was held that it was not illegal to convict them of mischief and theft, as the mischief preceded the theft which could not have been committed according to expln. 1 of s. 378 until the trees had been detached from the ground[1]. But where the accused stole a sheep and killed it, it was held that he could not be charged with and convicted of mischief as well as of theft[2].

Summary trial.—A person may be tried summarily for criminal trespass and mischief unless there is a bona fide claim of right depriving the Magistrate of jurisdiction[3].

Punishment.—In laying down the punishment for different degrees of the offences of mischief, the gradation observed refers to the amount of loss sustained, a mode of distinction not admitted in estimating the degrees of criminality in other offences against property[4]. The penal provisions relating to mischief have been framed on the same principle which pervades the Code of first providing a certain amount of punishment for all offences of a particular denomination and then proceeding to provide heavier punishment for aggravated offences of that kind[5]. This section provides punishment for the offence of mischief generally. But if in any particular case there is any circumstance which brings it within any of the subsequent penal clauses whereby heavier punishment is provided and if that circumstance can be proved, that subsequent clause is then the appropriate one for the punishment of the offence committed. And when one set of aggravating circumstances properly attaches to an act making it an offence, another set should not be applied to the same act, unless there be in the mind of the offender a wholly separate intention.

Mischief causing damage to the amount of fifty rupees.

427. Whoever commits mischief and thereby causes loss or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section provides for enhanced sentence where the loss or damage caused is upwards of fifty rupees.

In estimating the amount of the loss or damage caused, the actual loss or damage only should be taken into consideration and not the damage which, in consequence of such loss, may be occasioned to the sufferer[6]. But the damage done to several things may be added together, provided the things are damaged at one and the same time, or so nearly at the same time as to form one continuous transaction[7].

Statutory application.—See the Madras Pier Act (Mad. Act V of 1863), s. 7.

CASES.

Where some persons belonging to a certain village pulled up and removed fishing stakes lawfully fixed in the sea, within three miles of the shore, by the

[1] *Narayan Krishna*, (1866) 2 B. H. C. 392.

[2] *Madar Saheb*, (1902) 1 Weir 497; *Nga Paik Hmwe*, (1894) 1 U. B. R. (1892-1896) 241; *Nga Aung So*, (1900) P. J. L. B. 633; *Genya*, (1877) Unrep. Cr. C. 129; *Ramla Ratanji*, (1903) 5 Bom. L. R. 460. See *Krishna*, (1889) Unrep. Cr. C. 430, in which double conviction was considered to be legal.

[3] *Gamirullah Sarkar* v. *Abdul Sheikh*, (1884) 10 Cal. 408, disapproving *Shakur Mahomed* v. *Chunder Mohun Sha*, (1874) 21 W. R. (Cr.) 38.

[4] 1st Rep. s. 608.

[5] M. & M. 392.

[6] *Ibid*, 393.

[7] *Shepherd*, (1868) L. R. 1 C. C. R. 118.

villagers of another village, and the removal of the stakes, though without any intention to appropriate them, occasioned "damage", it was held that they had committed mischief[1]. Cattle belonging to the accused, who were Rabaris, having trespassed on the complainant's farm and done damage to the crops there, the accused were tried for the offence of mischief under this section and also for an offence under s 26 of the Cattle Trespass Act. It appeared that on previous occasions too cattle of each of the accused were impounded a number of times for similar acts. It was held that they were guilty of mischief[2].

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s 426, and further—

(5) That the loss or damage caused amounted to Rs 50 or more.

There ought to be evidence to show that the defendant caused mischief[3].

Procedure.—Not cognizable—Warrant—Bailable—Compoundable, when the only loss or damage caused is loss or damage to a private person—Triable by Presidency Magistrate, or Magistrate of the first or second class—Triable summarily.

Charge.—I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed mischief, causing loss or damage to the amount of——, and thereby committed an offence punishable under s 427 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (*d*) and 12 (2).

Mischief by killing or maiming animal of the value of ten rupees.

428. Whoever commits mischief by killing, poisoning, maiming[1] or rendering useless any animal[2] or animals of the value of ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section is intended to prevent cruelty to animals and consequent loss to the owner.

1. **'Maiming'.**—The term "maiming" refers to those injuries which cause the privation of the use of a limb, or a member of the body[4]. 'Maiming' implies a permanent injury[5]. Wounding is not necessarily maiming. Wounding is causing an injury to the person by which the skin is broken[6]. To constitute a wound it is necessary that there should be a separation of the whole skin; and a separation of the cuticle or upper skin only is not sufficient[7]. The external surface of the body must be divided[8]. 'Maiming' must mean some permanent injury because it occurs in this section and s. 429 between 'killing' and 'rendering useless'. This last expression again differs from 'diminishing utility,' the expression used

1 *Kastya Rama*, (1871) 8 B. H. C. (Cr. C.) 63.

2 *Punja Golad*, (1918) 21 Bom. L. R. 247, 45 Bom. Cr. C I

3 (1870) 5 M. H. C. App 30.

4 *Fattehdin*, (1881) P. R. No. 23 of 1881.

5 *Richard Jeans*, (1844) 1 C. & K. 539; [illegible]

in the definition of 'mischief'[1]. Meres, C. J., in a case[2] said: "It is true that in its primitive meaning the verb 'to maim' involves the notion of mutilation of some part of the body useful for fighting...I do not think the framers of the Code intended this restricted meaning only of this expression. It seems difficult to understand how many of the domestic animals could be 'maimed' within this meaning of the term. I think the expression would fairly include the amputation of any member, or the injury, of an animal by which its speed, or endurance, or use, was permanently diminished". Maiming then means some permanent injury to one of the members of the body. It involves the notion of the privation of the use of some limb or member involving a permanent injury and not a mere disfigurement[3]. Where the ribs of a pony were broken so as permanently to diminish its usefulness and value, it was held to be 'maimed'[4]. Similarly, where the ears of a horse[5], or an ass[6] were cut off, it was held that the accused was guilty of maiming. But where one-half of one ear of a mare was cut off whereby the animal's sense of hearing was not impaired, it was held that this did not amount to maiming within the meaning of this section[7]. Where the accused caused the death of a mare through injuries inflicted by his inserting the handle of a fork into her vagina and pushing it into her body, it was held that he was liable for killing, maiming or wounding the mare[8].

It is not necessary to prove that any instrument was used to inflict the wound[9]. Pouring acid into the eye of a mare, and thereby blinding her, was held to be maiming[10]. But, if a person inflicts wound on an animal whereby it is disabled for some days only, his offence falls under s. 426[11].

2. 'Animal'.—See s. 47, *supra*. The animal destroyed must be the subject of property. The escape of an animal that is originally in the condition of *feræ naturæ*, but is subsequently reduced into possession, does not terminate the owner's right to it, and any person shooting such an animal is guilty of mischief[12].

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 426; and further—

(5) That the property injured consisted of an animal or animals.

(6) That the value thereof at the time of injury was Rs. 10 or more.

(7) That the injury in question was caused by killing, poisoning, maiming, or rendering useles such animals.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed mischief by killing (*or* poisoning, etc.) an animal, to wit——, of the value of——, and thereby committed an offence punishable under s. 428 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (*d*) and 12 (2).

1 *Bahawal*, (1891) P. R. No. 7 of 1891.
2 *Nga San Yun*, (1885) S. J. L. B. 404.
3 *Anna Laxman*, (1916) 18 Bom. L. R. 289, 3 Bom. Cr. C. 194.
4 *Nga San Yun*, sup.
5 *Marigowda* v. *Srinivasa Rangachar*, (1911) 35 Mad. 594.
6 *Rangaswami Goundan*, (1917) 22 M. L. T. 68.
7 *Anna Laxman*, sup.
8 *Welch*, (1875) 1 Q. B. D. 23.
9 *Bullock*, (1868) L. R. 1 C. C. R. 115.
10 *Owen Owens*, (1828) 1 Mood. Cr. C. 205.
11 *Subrao Sukhal*, (1901) 3 Bom. L. R. 503.
12 *Subrayadu*, (1888) 1 Weir 498.

Mischief by killing or maiming cattle, etc., of any value or any animal of the value of fifty rupees.

429. Whoever commits mischief by killing, poisoning, maiming[1] or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow or ox[2], whatever may be the value thereof, or any other animal of the value of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

COMMENT

This section provides enhanced punishment owing to the greater value of the animals mentioned therein Intention is the gist of the offence. The accused threw a stone at a young buffalo and thereby caused its death, and it appeared that her intention was to drive it out of her backyard It was held that the accused was not guilty of mischief[1]

1. 'Maiming'.—See s 428, *supra*

2. 'Bull, cow or ox'.—According to the Madras High Court a 'calf' does not come within the term bull, cow or ox'[2], but the Calcutta High Court has held that the words 'bull' and 'cow' in this section include the young of those animals The section specifies the more valuable of the domestic animals, without any regard to age; but in respect of other kinds of animals not so specified, the section will not apply unless the particular animal in question is shown to be of the value of fifty rupees or upwards[3]

Bulls set at large according to a religious usage.—Such bulls are not the subject of ownership by any person, as the original owner surrenders all his rights as its proprietor and gives it its freedom to go withersoever it chooses. They are, therefore, *nullius proprietas*, and as such cannot be the subject of mischief[4]. But if there is not total abandonment of control and property, the animal would not cease to be the private property of the owner Before finding that the animal ceased to be the private property of any one it is necessary to see whether the ceremony at which it was released was followed by an abandonment of all control and property over it[5]. There is also a material distinction in principle between the case of an animal, property in which is wholly renounced or abandoned and allowed in accordance with superstitious or religious usage to roam at large free from control, and an animal so abandoned and at large after dedication to a temple[6].

PRACTICE.

Evidence—Prove points (1) to (4) as those for s. 426; and further—

(5) That the property injured consisted of an elephant, camel, horse, mule, buffalo, bull, cow, or ox; or that such property consisted of any animal of the value of Rs. 50 or more.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—triable by Court of Session, Presidency Magistrate or Magistrate of the first or second class

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed mischief by killing (poisoning, maiming *or* rendering useless) (*specify the animal: where the*

1 *Obammal*, (1901) 1 Weir 502.
2 *Cholay*, (1864) Mad. 4th Ses. Unrep.
3 *Hari Mandle* v *Jafar*, (1895) 22 Cal. 457
4 *Romesh Chunder Sannyal* v *Hiru Mondal*, (1890) 17 Cal. 852
5 *Ghanta Veeranna*, (1888) 1 Weir 500.
6 *Nalla*, (1887) 11 Mad. 145, 1 Weir 498.

animal is not of the kind mentioned in the section specify its value also), and that you thereby committed an offence punishable under s. 429 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (*d*) and 12 (2).

Mischief by injury to works of irrigation or by wrongfully diverting water.

430. Whoever commits mischief by doing any act which causes, or which he knows to be likely to cause, a diminution of the supply of water[1] for agricultural purposes, or for food or drink for human beings or for animals which are property, or for cleanliness or for carrying on any manufacture, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

COMMENT.

This section deals with diminution of water supply. Section 278 applies if the water is fouled so as to be unfit for use.

1. 'Diminution of the supply of water.'—Under this section the physical requisites of the act are the doing of any act which causes, or to the doer's knowledge is likely to cause, a diminution of supply. He also fulfils the mental requisites when he does this with intent to cause wrongful loss, and the intention is properly held to be such when he takes it without any sort of right, and it matters not that he claims to set up such a right if the facts are so clear that the claim is manifestly only an additional wrong. It is for judicial tact to distinguish where the case is sufficiently doubtful to prevent the inference of a wrong intent[1]. The words "diminution of the supply of water for agricultural purposes" refer to actual utilization of the particular water by particular persons who are deprived of it by the mischief complained of and not to the use to which such water is put by the accused and, therefore, the fact that the water was used by the accused also for agricultural purposes does not take the case out of this section[2].

The section applies equally to irrigation channels as to other sources of irrigation, such as tanks and ponds[3].

The placing, across a channel, of an embankment[4] or the cutting of an embankment[5], may lead to a diminution of supply. If a supply channel is obstructed or filled up by a dam put up or by raising a dam already existing, there is a change made in the channel which diminishes its value or utility and which, if it was done with intention to cause or with knowledge that it was likely to cause wrongful loss to any person, would constitute 'mischief'. If the act so done causes a diminution of supply of water an offence under the section is committed[6]. The mere deprivation of water supply to the complainant by a cut in the bund is not an offence under this section. It is the destroyed property that must have lost its utility or value to bring the offence under it.

Bona fides.—This section will not apply to proceedings taken by anybody in good faith in the exercise of his rights of property. Where, therefore, a Zamindar

1 *Ramakrishna Chetti* v. *Palaniyandi Kudambar*, (1876) 1 Mad. 262, F. B.; *Ashutosh Ghose*, (1929) 34 C. W. N. 86.

2 *Lukman*, (1926) 27 Cr. L. J. 1233.

3 *Sppu Chinna Mangaiya*, (1886) 1 Weir 510.

4 *Nalla Narayanasami*, (1884) 1 Weir 504.

5 *Sheikh Arif*, (1908) 35 Cal. 437.

6 *Deenabandu* v. *Visvasarayi*, [1923] M. W. N. 634.

stopped a water-channel running over his own land on the complainant's refusing to pay him the rent he demanded, it was held that he was not guilty under this section[1]. Where the accused cut open a *bund* and diverted water to his fields in anticipation of usual permission to do so, it was held that he had committed no offence under this section[2]. Where there was no doubt that the accused knew that by their act they were causing a diminution of the water supply and where they had not substantiated a right to take the water nor shown that the other side had no right, it was held that a bona fide claim to take the water could not be entertained[3].

CASES.

Diminution of the supply of water is necessary.—Where it appeared that the complainant was the exclusive owner of a water-course, and that the accused [illegible] g of a diminution of the [illegible] of a right, was held to be [illegible]ce[4] Where the accused closed a water-course by which water had been supplied to the complainant's land, he was held not to have committed this offence, as no damage was alleged to have been caused by the stoppage of water to any crop in the land[5] Where the accused bunded up a portion of the channel, running in his own land, and carrying water to the complainant's land to which he was not found to be entitled either by way of contract or by easement, it was held that no actual wrongful loss had been proved and that therefore the accused's action in bunding up the channel did not constitute any offence[6] On a partition between the complainants and the accused, who were members of a joint family, certain fields fell to the share of the former and other fields fell to the share of the latter On the lands allotted to the accused there had existed a channel for a long number of years which was used for carrying water to the fields which had been allotted to the complainants. Some years after the partition the accused filled up the channel with the result that water could not be carried to the lands of the complainants for purposes of irrigation. It was held that the loss caused to the complainants by the channel being filled up was wrongful loss and the accused must be presumed to have had the knowledge that their act in filling up the channel was likely to cause such wrongful loss to the complainants and that consequently they were quilty of an offence under this section[7].

[illegible] was not [illegible] was held [illegible]

Diminution of water by the cutting of an embankment.—Where the accused cut a dam erected by the complainant, not to take a supply of water but to save their own crops, and it was not proved that the act of the accused caused a diminution of the supply of water for agricultural purposes or that the accused knew that it was likely to cause such diminution in future, it was held that the accused could not be convicted of this offence[9].

The complainant put up an embankment on Government land without previous permission to store water for the use of his land The accused cut the em-

[1] [illegible] L. J. 1354

[2] *Kullappa Naicken* v. *Palani Ammal*, [1920] M W. N. 131, 27 M L T 214

[3] *Basdeo Singh*, (1924) 2 Pat L R. 194

[4] *Jagannath Bhikaji*, (1885) 10 Bom 183.

[5] *Kalaya*, (1885) Unrep. Cr C. 217; *Vattu Karan*, (1882) 1 Weir 507.

[6] *Budda Reddi*, (1922) 31 M L. T. 421, 44 M. L J 231

[7] *Krishna Iyer* v. *Ayyappa Naick*, (1924) 26 Cr L J. 1100

[8] *Aiyannagoud*, (1882) 1 Weir 507, *Sheikh* [illegible]

[9] [illegible] *luddin Mondal*, (1904) [illegible]

bankment and were charged with mischief but were acquitted on the ground that the complainant's act was illegal. It did not appear that the accused interfered to protect their own interests. It was held that the acquittal was wrong[1].

The accused cut the embankment of an irrigation tank and kept the embankment open for more than twenty-four hours and pleaded in excuse of their act the authorisation of the Public Works authorities given to them to take the water for twenty-four hours. It was held that, assuming the original act of cutting the embankment was lawful in consequence of the authorisation given by the Public Works authorities to the accused to take the water for twenty-four hours, by keeping the breach open for six hours longer they were guilty of an illegal omission which was under s. 32 of the Code equivalent to an illegal act and that they were guilty under this section as their act was clearly likely to cause a diminution of water supply for agricultural purposes; and that it was not necessary to prove actual damage[2]. But in a Punjab case it was held that the person by merely irrigating his land from a Government canal-cut for a period exceeding that allotted to him did not commit any offence under this section[3].

The accused entered into the lands of the complainant and cut three bunds which had been erected in a channel that ran through the land, with the result that water in that channel ran down another channel off the complainant's land and was utilised by the accused for sale to ryots holding the lands lower down. The complainant was entitled to the whole of the water in the channel in question. It was held that this section applied not only where the water was wantonly wasted but also where the accused himself utilised it or sold it to others provided the person entitled was deprived of its use[4].

PRACTICE.

Evidence.—Prove points (1) to (3) as those for s. 425; and further—

(4) That the mischief in question caused or was likely to cause diminution of the supply of water.

This is an essential element to be proved[5].

(5) That such supply of water was for purposes of agriculture; or for food or drink for human beings; or for animals which are property; or for cleanliness; or for carrying on any manufacture.

(6) That such mischief was done with a knowledge that it would or was likely to cause such diminution of the supply of water[6].

The prosecution must prove that there has been unlawful and intentional interference on the part of the accused with the admitted or proved rights of the complainant[7].

It is not necessary to prove actual loss[8].

Where there was nothing to show that the complainant had any legal right to the water intercepted by the accused, it was held that the complainant's loss was not wrongful and the offence of mischief was not established[9].

Procedure.—Cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

A Magistrate can make an enquiry by personal inspection of the disputed place[10].

1 Empress v. Gangadu, (1881) 1 Weir 511.
2 Ponnusami Tevan, (1881) 1 Weir 512.
3 Fazl Din, 1908 P. R. No. 14 of 1908.
4 Chidambaram Pillai v. Muhammad Khan Sahib, (1913) [illegible]; Muhammad, (1927) [illegible] Cr. L. J. 1320.
5 Tajuddin, (1903) [illegible] A. W. N. [illegible].
6 The Agra [illegible] (1916) [illegible] L. R. 124.
7 Emperor [illegible] v. [illegible], 1921 [illegible] Cr. L. J. [illegible].
8 (1881) 1 Weir 512.
9 Tan Ang, (1927) 5 L. B. R. 148.
10 Mangai Rahim, (1881) 1 Weir 505.

...arties in regard to a ... the channel, it was ... and that the act of closing the channel was not an offence[1].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed mischief by doing——which act caused (*or* which you knew to be likely to cause) a diminution of the supply of water for agricultural purposes (*or* for food, etc.,) and thereby committed an offence punishable under s 430 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Mischief by injury to public road, bridge, river or channel.

431. Whoever commits mischief by doing any act[1] which renders or which he knows to be likely to render any public road[2], bridge, navigable river, or navigable channel, natural or artificial, impassable or less safe for travelling or conveying property, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

COMMENT.

To support a conviction under this section there must be evidence of intention to cause mischief, and of knowledge that injury is likely to result from the act of the accused[3]. Such intention or knowledge is not necessary for offences under ss. 279, 280 and 283.

1. **'Act.'**—See s. 33, *supra.*
2. **'Road'.**—A path through a jungle is not a road[3]

CASES.

In a case where the accused was charged with committing mischief by doing an act which rendered a bridge impassable, it was proved (1) that two pieces of ...

found there was obviously no intention to cause mischief, and there was no sufficient evidence of knowledge that injury was likely to result from the act of the accused[4]. Where the accused dug a trench on waste land bordering upon the public road in order to protect his land from drainage water and thereby incidentally caused damage to the public road, it was held that this was not sufficient to constitute the offence of mischief[5]. Mere placing of bricks on a road was held not to come within this section[6].

[1] *Athinarayanasamy Pillai v. Subbier,* (1898) 1 Weir 505
[2] *Malayan Kalan,* (1883) 1 Weir 510.
[3] *Nga Shwe Laukke,* (1889) P. J. L. B. 629.
[4] *Malayan Kalan,* sup.
[5] *Kairthadi Anantha Bhattar,* (1888) 1 Weir 511.
[6] *Jugal Narain Singh,* (1908) 12 C. W. N. cxxii (122).

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 426; and further—

(5) That the mischief in question consists of an act rendering or likely to render impassable or less safe, a public road, bridge, navigable river or channel, natural or artificial, for the purpose of travelling or conveying property.

(6) That such mischief was done with a knowledge that it would, or was likely to, cause such injury.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Mischief by causing inundation or obstruction to public drainage attended with damage.

432. Whoever commits mischief by doing any act[1] which causes or which he knows to be likely to cause an inundation or an obstruction to any public drainage attended with injury or damage, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

COMMENT.

This section provides for a more severe punishment where the mischief is committed by causing inundation to public drainage as it affects the health of the community.

1. **'Act'.**—See s. 33, *supra*.

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 426; and further—

(5) That the mischief consisted of an inundation or obstruction to drainage.

(6) That such inundation or obstruction was, or was likely to be, attended with injury or damage.

(7) That such drainage was public.

(8) That the mischief was done with a knowledge that it would, or was likely to, cause such injury[1].

It is not sufficient to show probable consequential damage to other property[2]. The accused were convicted by a Magistrate for erecting a dam across the bed of a river knowing it to be likely that the lands of the adjacent village would be in consequence inundated. The High Court in quashing the conviction held that as the act done was the erecting of a dam which did not cause 'the destruction' of any property the offence of mischief was not committed[3].

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Mischief by destroying, moving or rendering less useful a light-house or sea-mark.

433. Whoever commits mischief by destroying or moving any light-house or other light used as a sea-mark, or any sea-mark or buoy or other thing placed as a guide for navigators, or by any act which renders any such light-house, sea-mark, buoy or other such thing as aforesaid less useful as a

[1] *Pran Nath Shaha*, (1876) 25 W. R. (Cr.) 69.

[2] (1868) 4 M. H. C. App. 15.

[3] *Ibid.*

guide for navigators, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

COMMENT.

This section is an extension of the principle laid down in s. 281. Sea-marks are very important in navigation and any tampering with them may lead to disastrous results.

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 426, and further—

(5) That the mischief consisted of an act causing the destruction, or moving of, or rendering less useful, a light-house, sea-mark, etc

(6) That such light-house, sea-mark, etc, was at the time of mischief used as a guide for navigation

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by *Court of Session.*

Mischief by destroying or moving, etc, a land-mark fixed by public authority

434. Whoever commits mischief by destroying or moving[1] any land-mark fixed by the authority of a public servant[2], or by any act which renders such land mark less useful as such, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENT.

This section deals with the destruction or removal of land-marks The preceding section dealt with sea-marks. But as destruction of sea-marks is likely to lead to disastrous consequences the punishment provided in s 433 is much higher than the punishment provided under this section.

1. **'Moving'.**—See s 378, Explanation 3, *supra*

2. **'Fixed by the authority of a public servant'.**—The Madras High [illegible] to occasion a breach of the peace to be demarcated by boundary pillars, and, consequently, if he does so, a person destroying or removing such boundary pillars is not liable to conviction under this section[2]. Where a surveyor empowered by a notification under the Survey and Boundaries Marks Act to survey certain lands, in good faith and under colour of his office, entered upon the lands of the accused and fixed demarcation stones on them and the accused obstructed the surveyor in measuring the lands and removed the demarcation stones, it was held that the accused were guilty under this section though it might be proved that the lands on which the surveyor carried on his operations were not actually included in the notification[3].

Innocent removal.—Where a person innocently removed a barricade, placed by a Municipality on a piece of land in front of his house, which impaired his ingress and egress to, or from, his house, it was held that he had committed no offence[4].

[1] *Madhava Bhonjo Santos*, (1916) 31 M. L. J. 305, 311, [1916] 2 M W. N. 183.
[2] *Ramesha*, (1904) 27 All 390
[3] *Madhava Bhonjo Santos*, sup.
[4] *Abdul Aziz*, (1895) Unrep Cr C 745.

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 426; and further—

(5) That the mischief consisted of an act causing the destruction, or moving of, or rendering less useful, a land-mark.

(6) That such land-mark was fixed by the authority of a public servant.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Mischief by fire or explosive substance with intent to cause damage to amount of one hundred or (in case of agricultural produce) ten rupees.

435. Whoever commits mischief by fire or any explosive substance[1], intending to cause, or knowing it to be likely that he will thereby cause, damage to any property to the amount of one hundred rupees or upwards, or (where the property is agricultural produce) ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

Where the mischief is committed by means of fire or any explosive substance and the evidence enables the Court to conclude that the offender intended or knew himself to be likely to cause wrongful loss or damage to the amount of 100 rupees, the conviction must be under this section. If the evidence falls short of this, but is sufficient to show that mischief to the amount of 50 rupees has been caused, whether by fire or by any means whatsoever, the offender may be convicted under s. 427. In the case of agricultural produce the value fixed under the section is Rs. 10, in the case of other property it is Rs. 100.

1. **'Explosive substance.'**—This expression, according to the Explosive Substances Act (VI of 1908), s. 2, includes any materials for making any explosive substance, also any apparatus, machine, implement, or material used, or intended to be used, or adopted for causing, or aiding in causing, any explosion in or with any explosive substance: also any part of any such apparatus, machine or implement.

Amendment.—The words "or (where the property is agricultural produce) ten rupees or upwards" were inserted by Act VIII of 1882, s. 1. The amendment was introduced to protect agricultural produce.

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 426; and further—

(5) That the mischief was caused by fire or some explosive substance.

(6) That the damage caused thereby amounted to Rs. 100 or more; or if the property in question is agricultural produce, to Rs. 10 or more.

(7) That the accused intended or knew that he was likely thereby to cause such damage.

Mere negligence or carelessness would be of no avail. Where the accused set fire to a heap of rubbish in his field which was close to a protected forest and the wind carried the flames to a forest and destroyed a part of it, it was held that he was not guilty of mischief[1].

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class.

[1] *Nandeyappagowda,* (1906) 8 Bom. L. R. 851.

...the fact
...ilding
...used
as a place of worship, or as a human dwelling, or as a place for custody of property[2]".

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss 6, 11 (3) (*d*) and 12 (2). See the Burma Laws Act, 1898, s. 4 (3) (*b*) and Sch. II.

Mischief by fire or explosive substance with intent to destroy house, etc.

436. Whoever commits mischief by fire or any explosive substance[1], intending to cause[3], or knowing it to be likely that he will thereby cause, the destruction of any building[3] which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section punishes mischief by fire or explosive substance Owing to the serious nature of the means employed the punishment is severe.

1. 'Explosive substance'.—See s. 435, *supra*

2. ... ...mitting mischief by ... committing mischief ... ... building, etc The intention is a most important element in such a charge[3].

3. 'Building' is not necessarily a finished structure[4]. An unfinished house, of which the walls were built and finished, the roof unfinished, a considerable part ... for plastering, ... at the building ... entioned in the ... ldings are from time to time used for purposes such as those stated in the section but they mean that ...

... child inside the *chaupal*. There was no evidence that the *chaupal* was ordinarily used as a human dwelling or for one of the other purposes specified in this section. Nor did the accused know that the child was inside when they set fire to it. It was held that under the circumstances no offence under s. 304 or this section had been established[6].

The Law Commissioners observe: "The grass or mat huts of the lowest classes are placed on a level with the substantial, secure, and valuable dwellings of the better classes...It is obviously proper that in the case of mischief by fire a distinction should be made between the huts.. and substantial houses, but there is sufficient room for such a distinction between the maximum of fourteen years and the minimum of one year, and between rigorous and simple imprisonment,...

1 (1865) 3 W. R (Cr. L) 7.
2 *Durbarro Police*, (1867) 8 W. R. (Cr) 3).
3 (1865) 3 W R (Cr. L) 18
4 *Manning*, (1871) L R 1 C. C. R. 338.
5 *William Edgell*, (1867) 11 Cox 132.
6 *Khanjan*, (1924) 25 Cr. L. J. 1190.

and we think it best that the distinction should be left to the discretion of the Judge"[1].

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 426; and further—

(5) that the property injured consisted of a building.

(6) that such building was ordinarily used as a place of worship, or as a human dwelling, or as a place for the custody of property.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

In a charge under this section the amount of mischief done is not altogether to be the measure of the penalty to be inflicted. A person who mischievously sets fire to a human dwelling may put in jeopardy the lives and the property, not only of those dwelling therein, but of others dwelling in adjoining houses, of persons assisting to put out the fire, and so on. Severe penalties of this section are, therefore, justified[2].

Charge.—In a case of mischief by fire with intent to cause the destruction of a dwelling-house, the charge should lay the intent as an intent to cause the destruction not of a house simply, but of a house used as a human dwelling[3].

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (*d*), and 12 (2).

A sentence of whipping is not legal under this section[4].

Mischief with intent to destroy or make unsafe a decked vessel or one of twenty tons burden.

437. Whoever commits mischief to any decked vessel[1] or any vessel of a burden of twenty tons or upwards, intending to destroy or render unsafe, or knowing it to be likely that he will thereby destroy or render unsafe, that vessel, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section operates in the case of decked vessels or any vessel of a burden of twenty tons or upwards. Only vessels of large dimensions have decks. Fishing boats, ferry boats, canoes, etc., will not come under it. Thus, small crafts of all kinds are excluded. The intention of the legislature is to punish mischief committed on vessels which are likely to carry passengers.

1. 'Vessel'.—See s. 48, *supra*. Where a sailor on board a ship entered a part of the vessel where spirits were kept, for the purpose of stealing rum, and, while tapping a cask of rum, a lighted match, held by him, came in contact with the spirits which were flowing from the cask tapped by him, and a conflagration ensued, which destroyed the vessel, it was held that a conviction for the arson of the vessel could not be upheld[5].

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 426; and further—

(5) That the mischief was committed in respect of a decked vessel, or a vessel of a burden of twenty tons or upwards.

[1] 1st Rep., ss. 614, 615.
[2] (1868) 8 W. R. (Cr. L.) 14.
[3] *Durbarro Polie*, (1867) 8 W. R. (Cr.) 80.
[4] *Jagannath*, (1927) 29 Cr. L. J. 666.
[5] *Faulkner*, (1877) 13 Cox 550.

(6) That the accused when committing mischief intended, or knew that he was likely, to render unsafe that vessel.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Punishment for the mischief described in section 437 committed by fire or explosive substance.

438. Whoever commits, or attempts[1] to commit, by fire or any explosive substance[2], such mischief as is described in the last preceding section, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section provides for much more severe punishment than the last section when the mischief is committed by fire or explosive substance to a decked vessel or a vessel of a burden of twenty tons or upwards

1. **'Attempts'.**—See s. 511, *infra.*
2. **'Explosive substance'.**—See s 135, *supra*

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s 426; and further—

(5) That the accused committed or attempted to commit mischief by fire, or any explosive substance

(6) That the mischief was committed in respect of a decked vessel, or a vessel of a burden of twenty tons or upwards.

(7) That the accused, when committing or attempting to commit mischief, intended, or knew that he was likely, to destroy or render unsafe such vessel.

Procedure—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Punishment for intentionally running vessel aground or ashore with intent to commit theft, etc.

439. Whoever intentionally runs any vessel[1] aground or ashore, intending to commit theft[2] of any property contained therein or to dishonestly misappropriate[3] any such property, or with intent that such theft or misappropriation of property may be committed, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section punishes an act which is akin to piracy. Under the section it is sufficient if a vessel is run aground or ashore with the intention to commit theft of any property contained therein; whether actual theft is committed or not is immaterial. As to what amounts to piracy, see p. 32

1. **'Vessel'.**—See s. 48, *supra.*
2. **'Theft'.**—See s. 378, *supra.*
3. **'Dishonestly misappropriate'.**—See ss. 403 and 24, *supra.*

PRACTICE.

Evidence.—Prove (1) that the property in question was contained in a vessel.

(2) That the accused ran such vessel aground or ashore.

(3) That he did so intentionally.

(4) That he intended thereby (*a*) to commit theft of the property so contained therein; or (*b*) to dishonestly misappropriate the same; or (*c*) that such theft or misappropriation thereof might be committed.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Mischief committed after preparation made for causing death or hurt.

440. Whoever commits mischief, having made preparation for causing to any person death[1], or hurt[2], or wrongful restraint[3], or fear of death, or of hurt, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

COMMENT.

The aggravating circumstance which is visited with severe punishment under this section is preparation for causing to any person death, hurt, or wrongful restraint if any opposition is offered while committing mischief.

1. **'Death'.**—See s. 46, *supra*.
2. **'Hurt'.**—See s. 319, *supra*.
3. **'Wrongful restraint'.**—See s. 339, *supra*.

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 426; and further—

(5) That when such mischief was committed, the accused had made preparation for causing death, hurt, or wrongful restraint, or fear thereof.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (1901), ss. 11 (3) (*d*) and 12 (2). As to Burma, see the Burma Laws Act (1898), s. 4 (3) (*b*) and Sch. II.

Of Criminal Trespass.

Criminal trespass.

441. Whoever enters into or upon property in the possession of another[1] with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property[2],

or, having lawfully entered into or upon such property, unlawfully remains there[3] with intent hereby to intimidate, insult or annoy any such person, or with intent to commit an offence[4],

is said to commit "criminal trespass".

COMMENT.

The authors of the Code say: "We have given the name of trespass to every usurpation, however slight, of dominion over property. We do not propose to make trespass, as such, an offence except when it is committed in order to the

commission of some offence injurious to some person interested in the property on which the trespass is committed, or for the purpose of causing annoyance to such a person Even then we propose to visit it with a light punishment, unless it be attended with aggravating circumstances.

"These aggravating circumstances are of two sorts. Criminal trespass may be aggravated by the way in which it is committed. It may also be aggravated by the end for which it is committed[1]".

Scope. Straight, J., in a case said: "The unusually vague and elastic lan-

conceive multitudinous cases, some approaching the verge of absurdity, that would fall within the letter, not the spirit, of the section, and which no one would for a moment consider fit subject even for civil proceedings, much less for a prosecution in a criminal Court. To lay down any rule, as to the extent to which its operation should be limited, is scarcely possible, but it is plain that its scope must be confined within those bounds that common sense and sound reason dictate[2]".

Ingredients.—The section has three essentials—

1. Entry into or upon property in the possession of another
2. If such entry is lawful then unlawfully remaining upon such property.
3. Such entry or unlawful remaining must be with intent
   (i) to commit an offence ; or
   (ii) to intimidate, insult or annoy the person in possession of the property

1. 'Whoever enters into or upon property in the possession of another'.— There must be an unauthorized entry into or upon property,—unauthorized, that is to say, either directly against the will of the person in possession, or constructively against his will, in the sense that he who enters has an unlawful intention, which, were it known to such person, would make him object, forbid or prevent the entry that in ignorance of such intention he sanctions and permits"[3].

A man may be guilty of criminal trespass on the land of another without ever personally setting foot on it, if for expample, he causes others to build on it against the wishes and in spite of the protest of the owner[4].

The use of criminal force is not necessary[5].

'Whoever' enters in the manner indicated in the section commits this offence: The accused must have committed the trespass in person. Merely sending a servant to plough up land is not an entry by the master[6].

'Property' in this section means immoveable corporeal property, and not incorporeal property. A right of fishery is not property of such a nature as that a man who unlawfully infringes that right can be said to enter upon property in the possession of another, within the meaning of this section[7] Similarly, a person plying a boat for hire at a distance of three miles from a public ferry cannot be said, with reference to such ferry, to commit criminal trespass[8].

'Possession'.—The possession must be actual possession of some person other than the alleged trespasser[9]. If one person forcibly enters upon property in the possession of another, and there does an act with intent to annoy the person so in

[1] Note N, p. 168.
[2] *Gobind Prasad*, (1879) 2 All. 465, 466; *Shistidhur Parui*, (1872) 9 Beng. L. R. App. 19; *Chooramoni Sant*, (1870) 14 W. R. (Cr.) 25.
[3] Per Straight, J., in *ibid*, p. 466.
[4] *Ghasi*, (1917) 39 All. 722, 15 A. L. J. 793.
[5] *Pottiradu v. Veerayya*, (1902) 12 M. L. J. 447.
[6] *Shwe Kun*, (1906) 3 L. B. R. 278; *Mg Shwe Kyi*, (1922) 1 B. L. J. 276.
[7] *Charu Nayiah*, (1877) 2 Cal. 354.
[8] *Mathra v. Jowahir*, (1877) 1 All. 527.
[9] *Faujdar*, (1878) P. R. No. 28 of 1878; *Kunji Lal*, (1913) 12 A. L. J. 151; *Parmeswar Lall Misser*, (1921) 22 Cr. L. J. 449, 7 P. L. T. 247.

possession, he is guilty of criminal trespass without reference to the question in whom the title to the land may ultimately be found[1]. A landlord who forcibly enters on land in the possession of a tenant after the expiry of the lease and dispossess him is guilty of an offence of criminal trespass, even where the lease gives him the right of re-entry on its termination[2]. The question of title is not to be raised on a plea of possession. But "a mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can, without delay, reinstate himself in his former possession"[3]. The offence may be committed in respect of property in a person's possession even though such possession may not have originated in right[4]. A person entering upon the property in the possession of another, when the latter is absent therefrom, is not guilty of criminal trespass when he enters upon it not with the intent to commit an offence[5].

It would seem that a person entitled to a right of way or other incorporeal right is not a person in possession of property within the definition of this offence, and there can be no criminal trespass 'into or upon' such property.

Joint possession.—A joint owner of land who enters upon the land with the intention or knowledge of doing a wrongful act commits criminal trespass[6]. A prosecution for criminal trespass on the part of one co-owner against another co-owner will not lie unless there has been an ouster from possession or some destruction or waste of the common property[7]. Where one co-sharer built upon a piece of a common land against the will of the other co-sharer, whose consent had been previously asked and refused, it was held that this circumstance alone was not sufficient to render the co-sharer so building guilty of criminal trespass[8]. One member of a joint family commits no trespass by entering into the house which forms the joint property, but he is guilty of that offence when he enters into the room ordinarily occupied by another member of the family[9]. A joint-owner of property is entitled to have joint possession restored to him in a civil Court; but he is not justified in taking the law into his own hands to recover possession. If he does so he is liable for criminal trespass[10]. The entry of a stranger into a family dwelling house, with the permission and license of one of the members, is not criminal trespass[11].

Entry to commit an offence.—Where a person entered upon another's property to cut down trees in that property, it was held that he had committed this offence[12]. Where a person does not personally set foot on the land of another but gets people to build on it in spite of the protests of that other, he is guilty of criminal trespass[13]. Where the accused cultivated village waste-land, which he had been ordered not to cultivate, it was held that this offence was committed as he had entered upon the land with intent to commit an offence under s. 188[14]. Where the accused enclosed and cultivated a portion of a burial ground, it was held that he had committed this offence. The Court said: "The person (corporate) in

1 *Ram Dyal Mundle*, (1867) 7 W. R. (Cr.) 28.

2 *Dwarka Singh* v. *Ram Kishun Singh*, (1917) 18 Cr. L. J. 402.

3 Per Denman, C. J., in *Browne* v. *Dawson*, (1840) 12 Ad. & E. 624, 629.

4 *Surwan Singh*, (1869) 11 W. R. (Cr.) 11.

5 *Chinna Thoyi*, (1895) 1 Weir 518; *Narain Das*, (1918) 17 A. L. J. 334; *Balkrishna Narhar Velhankar*, (1924) 26 Bom. L. R. 978, 7 Bom. Cr. C. 221; *Moti Lál*, (1925) 47 All. 855.

6 *Ram Prasad*, (1911) 8 A. L. J. 927.

7 *Khaja Mahomed Hamin Khan*, (1881) 3 Mad. 178, 1 Weir 286.

8 *Ram Sarup*, (1914) 36 All. 474.

9 *Prankristo Chunder* v. *Bissonath Chunder*, (1871) 15 W. R. (Cr.) 6.

10 *Gopalrao Venkatesh*, (1908) 10 Bom. L. R. 285.

11 *Prankrishna Chandra*, (1870) 6 Beng. L. R. App. 80.

12 *Jeenut Bebee*, (1864) 1 W. R. (Cr.) 46.

13 *Ghasi*, (1917) 39 All. 722, 15 A. L. J. 793.

14 (1870) 5 M. H. C. App. 17. See *Nagoji Ramchandra*, (1898) 1 Weir 143.

possession of the burial ground is the portion of the public entitled to use the burial ground, . and there was evidence of an intent to annoy such person, for the intent of the defendant must be inferred from the nature of his acts, and it is scarcely possible to conceive any act more calculated to cause annoyance, especially to superstitious people attaching sanctity to the relics of mortality, than the act of ploughing up a burial-ground"[1]. One N lawfully seized a cow belonging to the accused and had it impounded in the cattle pound. The accused, the owner of the cow, proceeded to the cattle-pound, opened the lock, entered and drove off the cow after slightly injuring the chaukidar who attempted to prevent him. It was held that the accused was guilty of criminal trespass, as his act amounted to an entry upon property in the possession of another person with intent (1) to commit an offence (i. e., an act which is made an offence by the Cattle Trespass Act) and (2) to intimidate the chaukidar in charge of the premises[2].

No criminal trespass is committed if the entry is not to commit an offence [illegible] uit [illegible] on [illegible] where an excommunicated Hindu wife entered the house of her husband to claim maintenance[6], where a person effected an entry into a Local Fund market with intent to evade payment of market dues[7], where A, having shot a deer near B's land, followed it into D's land for the purpose of killing it, although he was warned off the land beforehand[8]; where a man for several years cultivated land under a [illegible] entered into his own lands permissively used or occupied by, but not in the possession of, another[10]; where a person fished in a tank to which the public generally had access[11]; where a person entered into premises purchased by him at a Sheriff's sale for the purpose of acquiring possession[12], where a Zamindar, under the pretext that one of his tenants had left the village and abandoned his holding, took possession of the tenant's holding wrongfully[13]; and where the accused drove a cart over Government waste land in respect of which the Municipality had put up notices prohibiting cart traffic[14], this offence was held not to have been committed.

The accused granted a lease of pepper on certain hills described to be the propert[illegible] within the boundaries mentioned [illegible] the accused but also other land st[illegible] lessee conveyed his rights to others, and, under colour of the lease, the sub-lessee bona fide entered upon the land and took the pepper The accused was convicted of abetment of criminal trespass and of theft. It was held that the execution of the document could not

[1] (1871) 6 M H. C. App. 25, 26. But see 6 M. H C. App. 26 in which a person who [illegible] (Cr. C) 6

[4] *Kushee*, (1887) Cr. R. No. 18 of 1887, Unrep. Cr. C. 328.

[5] (1870) 5 M H. C. App. 38

[6] *Marimuttu*, (1881) 4 Mad 243, (1881) 1 Weir 523.

[7] *Varthappa Nayakan*, (1882) 5 Mad 382.

[8] *Chunder Narain* v. *Farquharson*, (1879) 4 Cal 837.

[9] *Foujdar*, (1878) P R. No 28 of 1878.

[10] *Daniel Groves*, (1882) 1 Weir 521.

[11] (1879) 1 Weir 520.

[12] *Charoo Chunder Mutty Laul*, (1899) 4 C. W. N 47.

[13] *Jangi Singh*, (1903) 26 All. 194; *Bazid*, (1904) 27 All 298

[14] *Nga U Thit*, (1909) U. B R (P. C.) 25.

be said to aid either the entry or the taking, and that, in the absence of evidence that the accused either suggested the entry or the taking, he was not guilty[1].

Where a servant of a proprietor, who had voluntarily surrendered his estate to the Court of Wards, cut or removed bamboos, etc., growing thereon for the benefit of his master, it was held that no offence was committed[2]. A school was built by public subscription and put in charge of a teacher. He went away having locked the building. The accused who were some of the managers of the school took possession of the building and started certain classes in it. They were convicted of criminal trespass. It was held that the conviction was improper as the building was not in the possession of the complainant and the accused had no intention of annoying him[3].

2. 'With intent to commit an offence or to intimidate, insult or annoy any person in possession of such property'.—The word "intent" is not to be taken as identical with "wish" or "desire". The intention constitutes the entry criminal. Merely to trespass is not ordinarily such an offence; but when the trespass is in order to the commission of an offence, or when it is to intimidate, to insult, or to annoy, it is punished. Thus, the essence of the offence is the intent in committing the trespass[4]. "It must be proved that some criminal intent was present in the mind of the accused, and it does not at all follow that, because an act is unlawful, and is one that the civil law will restrain, or for which it will compensate the injured party in damages, it is necessarily criminal"[5]. An intent to commit an offence punishable with imprisonment is not the same thing as an attempt to commit such offence. It exists before the attempt is begun. A mere intent is not by itself an offence. Therefore, where it is used as essential to bring a particular act within the category of criminal offences, and proof has been given that such an act accompanied by such an intent has been committed, the offence is complete, even though the further act intended may not have been committed or even attempted. Where an offender enters the premises of his neighbour on his way to the private apartments occupied by that neighbour's wife with intent to commit adultery, the offence of criminal trespass is complete long before the stage of an attempt to commit the adultery is reached[6]. There must, in all cases, be found an intent to commit an offence or to cause intimidation, insult or annoyance. A conviction could not follow merely because one could pronounce with certainty that the accused must have known that his act would, as one of its inevitable incidents, cause annoyance[7]. Criminal trespass depends on the intention of the offender and not upon the nature of the act and when the man's intention is to save his family and property from imminent destruction it cannot be said that because he commits civil trespass on his neighbour's land and cuts a portion of an embankment belonging to his neighbour which he ordinarily would not be justified in doing, he is guilty of any criminal offence[8]. It is one thing to entertain a certain intention and another to have the knowledge that one's act may possibly lead to a certain result. The section is so worded as to show that the act must be done with intent and does not, as other sections do (e.g., s. 425), embrace the case of an act done with knowledge of the likelihood of a given consequence. Although a trespasser knows that his act, if discovered, will be likely to cause annoyance, it does not follow that he does the act with that intent[9].

1 *Parapravan Bavothi Hadgi*, (1890) 1 Weir 48.

2 *Parmeshwar Singh*, (1910) 38 Cal. 180.

3 *Narain Das*, (1918) 17 A. L. J. 334.

4 See *Mathura Rai*, (1928) 50 All. 637; *Khurshedji*, (1926) 21 S. L. R. 263.

5 Per Rattigan, J., in *Alladitta*, (1882) P. R. No. 29 of 1882; *Gunpat*, (1889) Cr. R. No. 43 of 1888, Unrep. Cr. C. 390; *Rehana*, (1923) 5 Lah. 20.

6 *Dhantua Lodhi*, (1915) 19 Cr. L. J. 881.

7 *Moti Lal*, (1925) 47 All. 855.

8 *Madan Mandal*, (1913) 41 Cal. 662.

9 *Rayapadayacki*, (1896) 19 Mad. 240, 241, approving *Sivaratri Guravaiya*, (1885) Weir (3rd Edn.) 329, disapproving *Veda Gurukkal*, (1882) Weir (3rd Edn.) 328. See, to the same effect, *Venkataramanuja Reddi*, (1909) 6 M. L. T. 262; *Po Kin*, (1902) 1 L. B. R. 355; *Tharu*, (1911) 5 S. L. R. 29.

If the entry is to commit an offence, criminal trespass is committed[1]. In a Madras case it is laid down that it is sufficient if the evidence leaves no reasonable doubt that the accused intended to commit some offence. It is not necessary for the Magistrate to find what specific offence he wanted to commit[2]. Where a cow belonging to the accused was found grazing in the wheat crops of a certain person who had it impounded in the cattle pound and the accused proceeded to the cattle pound, opened the lock, entered, and drove off his cow, it was held that as the accused entered with intent to commit an act, which was made an offence by the [illegible]

[illegible]

should be in the possession of another[4] Where the complainant was not in actual physical possession of the land, no offence of criminal trespass could be committed against him[5].

'To intimidate, insult or annoy any person in possession of such property'. —Trespass is an offence only if it is committed with one of the intents specified in the section and proof that a trespass committed with some other object was known to the accused to be likely or certain to cause insult or annoyance is insufficient to sustain a conviction[6] The accused's son, a young boy, having stolen some jewels belonging to his father, told him that he had given them to the Head Master of his school, the complainant, who kept them in a box in his house. Thereupon the second accused with his friends, the other four accused in the case, went into the complainant's house, and in spite of the latter's protest and remonstrances insisted on searching, and did in fact search, the house. But nothing was found The complainant naturally felt insulted and annoyed at the high-handed conduct of the accused and lodged a complaint against the accused. It was held that the accused were not guilty of criminal trespass[7]

In a Full Bench case the former Chief Court of the Punjab held that where a person claiming a title to property, whether his title be good or bad, entered without any legal justification upon property in the established possession of another, he must be inferred to have had an intent to annoy the person in possession even though he had no primary desire to annoy and his only object was to obtain possession for himself[8].

As to the word 'offence,' see s 40, *supra*

The intention t [illegible] structive as well as a[illegible] During the pendency [illegible] and [illegible] went [illegible] his absence, and when the defendant's servants objected to their action, persisted in their trespass, and endeavoured to prevent opposition by making false statements

[1] *Jeenut Bebee*, (1864) 1 W. R. (Cr.) 46.

[2] See *Samban*, (1881) 1 Weir 530, followed in *Kurnan Seshayya*, [1911] 2 M W. N. 71, 21 M. L. J. 781.

[3] *Bhola*, (1927) 9 L L. J. 354

[4] *Chinkwana*, (1901) 1 U. B R. (1897-1901) 352, 353

[5] [illegible]

[6] [illegible] Mad [illegible] *Palk* [illegible] overruled

[7] *Vulluppa* v. *Bheema Row*, sup.

[8] *Ram Saran*, (1905) P R. No. 12 of 1906, F. B., Per Clark, C. J , and Reid, J. Rattigan, J , dissented from this view and held that it was not enough for the prosecution to prove or for the Court to find that the accused knew that his entry would probably annoy the person in possession, but it is absolutely essential to affirmatively establish and find that the accused acted with an intention to annoy: mere *knowledge* that annoyance is likely to result is not sufficient.

[9] *Maung Kado*, (1895) 1 U. B. R (1892-1896) 264.

as to the authority under which they were acting. It was held that their actions amounted to criminal trespass as their object in taking swords with them was to intimidate[1].

'Annoy'.—"The word 'annoy'...must be taken to mean annoyance that would generally and reasonably affect an ordinary person, not what would specially and exclusively annoy a particular individual"[2]. "'Annoyance' is a wider term than nuisance, and if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible...inhabitant of a house—if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort"[3]. "Mere knowledge of the possibility of annoyance resulting from an act of trespass is not sufficient to bring the case within the definition (of trespass) but...the word 'intent' cannot be read as if it were identical with 'wish' or 'desire'. There may be no wish to annoy but if annoyance is the natural consequence of the act, and if it is known to the person who does the act that such is the natural consequence then there is an intent to annoy. Most acts in the common course of natural events and human conduct lead to a series of results, and if these results are foreseen by the person doing the acts they cannot be said to be caused unintentionally. The ultimate object may be something different but the person intends all the intermediate results which he knows will happen in the natural course of events, even though he may regret that they should happen. When it is uncertain whether a particular result will follow... there may be no intent to cause that result even though it may be known that the result is likely. But it seems impossible to contend when an act is done with a knowledge amounting to practical certainty that a result will follow, that it is not intended to cause that result"[4]. Where an accused person has forcibly or clandestinely entered a house which he knew to have been definitely closed and barred against him by the owner thereof, in that case the Court may find that the intention to insult or annoy, under such circumstances, was so clearly inherent in the acts of the accused as to form an essential part of the purpose with which entry into the house was effected. If there is an invitation (to enter a house) combined with an intention (on the part of the accused) to preserve strict secrecy, then it is difficult to say that there is any intention to annoy a third person, but if that third person has expressly prohibited the accused then his act becomes a direct defiance to an express order and an intention to annoy the author of the order may be inferred from it. A person was found inside the house of another at night and he pleaded in defence, first, that he had entered the house at the request of one of the inmates and, secondly, that he had no intention of annoying or insulting the complainant. It was found that he had taken the precaution of keeping his presence in the house entirely secret from the owner thereof, and it was not found that he was forbidden to enter the house by the owner. It was held that the conviction of the accused without enquiry into the truth or otherwise of the defence set up was bad in law[5]. Where it was proved that a person entered a house with intent to

[1] *Golap Pandey* v. *R. H. Boddam*, (1889) 16 Cal. 715.

[2] Per Straight, J., in *Gobind Prasad*, (1879) 2 All. 465, 467.

[3] Per Bowen, L. J., in *Tod-Heatly* v. *Benham*, (1888) 40 Ch. D. 80, 98.

[4] Per Fulton, J., in *Luxman Raghunath*, (1902) 4 Bom. L. R. 280, 282, 26 Bom. 558. This case in not reconcilable with *Chunder Narain* v. *Farquharson*, (1879) 4 Cal. 837; *Rayapadayachi*, (1896) 19 Mad. 240. and has been dissented from in *Vullappa* v. *Bheema Row*, (1917) 41 Mad. 156, F. B., but it has been referred to with approval in *Chhote Lal*, (1917) 40 All. 221. It may be observed that intent and knowledge are distinguishable in the Indian Penal Code. In definitions of some of the offences both the words occur. In others only intent enters as an ingredient. The doctrine presuming intention from knowledge cannot be safely applied to the Indian Penal Code.

[5] *Chhote Lal*, sup.; *Asa Ram*. (1923) 1 Lah. C. 340.

have illicit intercourse with a widow, it was held that he was not guilty of any offence[1]. But where the accused could not prove to the satisfaction of the Court that he had an intimacy with a widow living in the house, it was held that he was guilty of lurking house trespass[2]. The former Chief Court of the Punjab held in a case in which the accused had entered into the complainant's house with the intention of having illicit intercourse with his widowed sister, that he was guilty of criminal trespass inasmuch as the particular object could not be obtained except by causing great annoyance to the owner of the house. In such cases secondary intention is sufficient, and a man may well be said to intend the inevitable consequences of his act[3]. But this case has been dissented from subsequently in a case in which the accused has entered into a house to carry on an intrigue with a girl on receiving information that her father was absent, but was caught by her uncle before he could get away. The Court held that it could not be said that the accused either intended or expected that his conduct would cause annoyance by being made public[4]. A house was occupied only by the owner and his concubine who had an intimacy with the accused. The accused entered the house at her invitation in the absence of the owner and took measures to conceal himself as soon as the owner arrived who, however, arrested him It was held that the accused was not guilty of an offence under this section[5].

Where the accused entered on the land of another to stop him from ploughing in order to make him render an account[6], where the complainant leased a portion of his lands to certain tenants for the purpose of making bricks and the accused entered on such land with an intention to annoy the complainant[7], where the accused acting on behalf of or under the colour of the right of their master to whom possession had been awarded by a civil Court, entered upon land in the physical possession of tenants or others prima facie entitled to retain possession until ousted by due course of law[8]; where a person unauthorizedly entered the compound of the complainant's house in order to effect an entry into a neighbour's house to execute a warrant of attachment[9], where a person, after having been ejected by due process of law from certain agricultural land, wilfully persisted in trespassing upon such land[10]; where the complainant, the purchaser of the rights of a mortgagee in possession and his predecessor-in-title, had been peacefully in possession of certain agricultural land for some years, and a relation of the mortgagor forcibly ousted the complainant on the plea that he was under the Hindu law entitled to share in the land and the mortgagor had no title to make a mortgage thereof with possession[11], it was held that this offence was committed.

The accused was convicted under s. 509 for causing the roof of a house belonging to him, which the complainant occupied as his tenant, to be removed while the complainant's wife, a *purdanashin* woman, was in it, without giving any notice beforehand, and thereby causing her to be exposed to public view. It was held that the removal of the roof in the circumstances amounted to criminal trespass as it was clear that the accused intended to annoy the complainant, and house-[illegible] (s. 448) was thus established[12].

[illegible] the accused [illegible] under trial.

1 [illegible] (1916) 38 All. 517 [illegible] Kangla, 19 All. (1894) [illegible] No. 12 U. B. [illegible] 1909 [illegible]

2 [illegible]

6 Weir (3rd Edn.) 204

7 *Munnandi Pillai*, (1882) 1 Weir 517.

8 *Srinivasaiyangar*, (1884) Weir (3rd Edn.) 320.

9 [illegible] (1877) [illegible] 350.

The accused was ordered to withdraw by the headman, but he remained there to witness the proceedings. He was subsequently pushed out and then prosecuted for committing house-trespass. It was held that he had not said or done anything from which an intent to intimidate, insult, or annoy, might be inferred, and he was therefore not guilty[1].

An intention to intimidate, insult or annoy any person in possession of a house does not mean to insult or annoy any person in constructive but in actual possession of the premises[2]. The section contemplates actual possession, not mere juridical possession. Where there is a person in actual physical possession of property, he is the only person whose feelings have to be considered under this section[3]. An owner has no right to re-enter land which he has let to a tenant, and may be convicted of an offence for so doing under s. 447 unless it can be shewn that the tenancy has been determined in accordance with law[4]. Where the accused occupied and locked up an empty house belonging to the complainant with the intention of asserting his title and gaining and holding possession of the house as against the complainant, it was held that as the complainant was not in possession of the house either by himself or through any other person when the trespass was committed, he could not be said to be in 'possession' within the meaning of this section; and that intimidation, insult or annoyance are results which more naturally follow when premises were occupied than when vacant[5].

'Any person in possession'.—The possession contemplated and intended by this section must be "actual in the sense and meaning of s. 530, Criminal Procedure Code"[6]. Section 530 of the Code of Criminal Procedure of 1872 related to maintenance of possession in the case of apprehended breach of the peace. The person who was in actual occupancy of a property, whether he has any title in him or not, is to be maintained in possession in case of an apprehended fight over the property. The person to be annoyed must be on the premises, otherwise there could be no criminal trespass[7]. Of two rival claimants, A and B, to some immovable property, including a certain shop, A was in possession of the shop through a tenant. The tenant, however, vacated the shop, whereupon B occupied it and locked it up. It was held that A could not, at the time of the occurrence, be said to be in possession of the shop within the meaning of this section and that the intention of B was not necessarily that required to constitute the offence of criminal trespass within the meaning of this said section[8]. The words 'any person in possession' do not mean only "a complainant in possession" there being no authority for taking the offence of mischief and trespass out of the general rule which allows any person to complain of a criminal act[9]. C, a rate-payer, who had filed a petition against an assessment which in his absence had been dismissed, entered a room, where a committee of the Munipal Commissioners were seated hearing and deciding petitions in assessment matters, ostensibly with the object of presenting a petition for the revision of his assessment. The Chairman ordered him to leave the room, and on his refusal to do so, he was turned out. Outside the room in the verandah he addressed the crowd

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1 *Nga Po Ya*, (1922) 2 B. L. J. 17. See *Avudayappa Mudaliar*, (1923) 18 L. W. 181.

2 *Ishur Chunder Kurmokar* v. *Seetul Das Mitter*, (1872) 17 W. R. (Cr.) 47.

3 *Tok Gyi*, (1916) 8 L. B. R. 425. *Bhagwan Din*, (1918) 16 A. L. J. 501, leaves the point open. See *Jambulinga Chetty*, (1924) 47 M. L. J. 437, [1924] M. W. N. 546, which lays down that entry on a vacant piece of land for puttng up a water-pandal with the consent of the person who could assert his title to the property under a registered deed is sufficient as against the person in actual possession under an unregistered sale-deed.

4 *Maung San Myin*, (1922) 2 B. L. J. 37.

5 *Moti Lal*, (1925) 47 All. 855.

6 *Gobind Prasad*, (1879) 2 All. 465, 468.

7 *Moti Lal*, (1925) 47 All. 855, 858.

8 *Ibid.*

9 *Keshavlal Jekrishna*, (1896) 21 Bom. 536; *Prayag Singh* v. *Morgan*, (1920) 33 C. L. J. 118; *Rayaz Singh*, (1920) 25 C. W. N. 425; *Daga Bhika*, (1928) 30 Bom. L. R. 631, 9 Bom. Cr. C. 301.

complaining that no justice was to be obtained from the Committee. It was held that he had committed no offence[1].

3. 'Having lawfully entered into or upon such property, unlawfully remains there'.—[illegible]
must be an unlawful [illegible]
of the person in poss[illegible]
of property upon which he has unlawfully entered is as liable to punishment as a person who remains unlawfully on property which he has entered lawfully provided he is actuated by one of the intentions mentioned in this section, and he is liable to be convicted in respect of such unlawful continuance even though he has already been convicted in respect of the original unlawful entry inasmuch as each time the true owner goes upon the property or makes a claim under circumstances sufficient in law to constitute re-entry, and the trespasser opposes him with the intention required by this section, a new offence is committed and a new liability arises[2].

An unlawful act is not necessarily an offence (s. 40), and an intention to commit such act does not render the accompanying trespass criminal[3]. Thus, unlawful infringement of a right of exclusive fishing in a part of a public river is not an offence which can be brought within the definition of criminal trespass[4].

The accused placed bricks on complainant's land with his permission but subsequently refused to remove them. For this he was convicted of criminal trespass. It was held that the possession being lawful in its inception the subsequent refusal did not amount to criminal trespass and the matter was one for decision by a civil Court[5]

In proceedings under s. 145, Criminal Procedure Code, the Magistrate must confirm the party who is in actual possession and he is not competent to dispossess such a party by appointing a receiver Persons who continue to remain on the property after the appointment of a receiver appointed in such circumstances cannot legally be convicted under s. 448[7].

Bona fide claim.—"If a person enters on land in the possession of another in the exercise of a *bona fide* claim of right, but without any intention to intimidate, insult, or annoy the person in possession, or to commit an offence, then although he may have no right to the land he cannot be convicted of criminal trespass, because the entry was not made with any such intent as constitutes the offence... But the mere assertion of a claim of right is not in itself a sufficient answer to such charges. It is the duty of the criminal Court to determine what was the intention of the alleged offender, and if it arrives at the conclusion that he was not acting in the exercise of a bona fide claim of right, then it cannot refuse to convict the [illegible]

his own right, he cannot be held guilty of criminal trespass[10]. It should distinctly

1 *Chandi Pershad* v. *Evans*, (1894) 22 Cal [illegible]

2 All. 4[illegible], 4[illegible].

3 *Bandhu Singh*, (1927) 6 Pat. 794

4 *Alladitta*, (1882) P. R. No. 29 of 1882

5 *Charu Nayiah*, (1877) 2 Cal. 354.

6 *Nand Singh*, (1925) 26 P. L R. 247.

7 *Mewa Lal*, (1927) 3 P. L J. 147.

8 Per Turner, J, in *Budh Singh*, (1879) 2 All. 101, 103; *Gokul Chund* v. *Seith Roshun Lal*, (1870) 2 N. W. P. 82; *Shistidhur Parui*, (1872) 9 Beng. L R. App. 19, *Po Ke*, (1904) 2 L. B R. 319, 10 Burma L. R. 358; *Maung Kado*, (1895) 1 U. B R. (1892-1896) 264; *Ramchandra* v *Ratho*, (1908) 5 N. L R. 69, *Abdul Latif*, (1911) 5 S. L R. 135; *Jagan Dubey*, (1918) 19 Cr L. J. 629; *Debi Dayal*, (1924) 25 Cr. L. J. 1047, *Habib Musalman*, (1927) 28 Cr L. J. 952.

9 *Arunachala Achari*, (1881) 1 Weir 520. See *Jhumuk Nomah* v *Shadashib Roy*, (1881) 7 Cal. 26; *Chaloo Mandal*, (1906) 11 C. W. N 467.

10 *Jurakhan Singh*, (1907) 7 C. L. J 238; *Reajaddin Molla*, (1914) 18 C. W. N. 1245; *Akshoy Singh* v. *Rameswar Bagdi*, (1916) 43 Cal. 1143; *Bhagwan Din*, (1918) 16 A. L. J. 501.

be found whether the entry of the accused upon the land was in the exercise of a bona fide claim of right or with one of the intents requisite to constitute a trespass criminal within the meaning of this section. If the accused entertained the belief in good faith that he was entitled to the possession of the land, his entry and continuance on it would constitute a trespass on the land for which he would, if he failed to prove his title, be answerable in a civil suit, but would not be liable to a criminal charge. If, on the other hand, the circumstances are such that he could not have entertained such a belief in good faith, it would be a fair inference that he intended the annoyance which his action must have caused to the complainant, and the conviction would be proper[1].

Re-entry into or remaining upon land from which a person has been ejected by civil process, or of which possession has been given to another, for the purpose of asserting rights he may have solely or jointly with other persons, is not criminal trespass unless the intent to commit an offence or to intimidate, insult or annoy is conclusively proved[2]. But where A was in peaceful possession of land which he claimed to hold in mortgage from B, and C entered on the land and ploughed it ousting A, on the ground that he had bought the land from B, it was held that A was not liable to be ousted from the land save in due course of law, and C rendered himself liable to a conviction of criminal trespass[3]. Similarly, a forcible entry upon land, which had been sold in execution of a money-decree and of which actual possession had been given to the purchaser under s. 318 of the Criminal Procedure Code, without resistance or opposition, and over which the purchaser had thereafter exercised acts of possession, by sub-tenants claiming under a lease of an antecedent date from the judgment-debtor, was held to be criminal trespass[4]. Thus, superior title in the accused will not by itself convert the complainant into a mere trespasser, so as to justify him in ejecting the complainant, if the latter be in possession otherwise than as a mere trespasser[5].

Statutory application.—See Orissa Tenancy Act (Beh. & O. Act II of 1913), s. 210; the Agra Tenancy Act (U. P. Act II of 1901), s. 149; the Bombay City Police Act (Bom. Act IV of 1902), s. 111.

House-trespass.

442. Whoever commits criminal trespass by entering into[1] or remaining in any building[2], tent or vessel[3] used as a human dwelling, or any building used as a place for worship, or as a place for the custody of property, is said to commit "house-trespass".

Explanation.—The introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass.

COMMENT.

Circumstances which aggravate the offence of criminal trespass are of two sorts. "Criminal trespass may be aggravated by the way in which it is committed. It may also be aggravated by the end for which it is committed"[6].

[1] *Devarasetti Gangaiya*, (1884) 1 Weir 516; *Po Ke*, (1904) 2 L. B. R. 319, 10 Burma L. R. 358; *Maung Shwe Ku*, (1923) 2 B. L. J. 55.

[3] *Gobind Prasad*, (1879) 2 All. 465; *Shah Muhammad* v. *Ganesh Dass*, (1904) P. R. No. 13 of 1905; *Nanak Chand*, (1883) 3 A. W. N. 188; *Kewal* v. *Tufail Ahmad*, (1924) 26 Cr. L. J. 1125.

[3] *Mya Zan*, (1902) 1 L. B. R. 358.

[4] *Kailash Ghose* v. *Jugal Lohar*, (1905) 1 C. L. J. 104; *Gill*, (1904) P. L. R. No. 138 of 1904.

[5] *Ponnusami Pillai*, (1899) 1 Weir 522; *Rabi Lochan* v. *Purna Chandra Dey*, (1906) 11 C. W. N. 171; *Chhakoo Mandal*, (1906) 11 C. W. N. 467.

[6] Note N, p. 168.

The authors of the Code say: "There is no sort of property which it is so desirable to guard against unlawful intrusion as the habitations in which men reside, and the buildings in which they keep their goods. The offence of trespassing on these places we designate as house-trespass, and we treat it as an aggravated form of criminal trespass"[1].

1. **'Entering into'.**—The introduction of any part of the trespasser's body is entering sufficient to constitute house-trespass[2]

2. **'Building'.**—What is a 'building' must always be a question of degree and circumstances: its ordinary and usual meaning is, a block of brick or stone-work covered in by a roof[3]. The mere surrounding of an open space of ground by a wall or fence of any kind cannot be deemed to convert the open space itself into a building, and trespass thereon does not amount to house-trespass[4] A courtyard partly surrounded on the front by a mud wall with no roof over it nor any door or gateway is not a building or house within the purview of this section[5]. According to the Code any construction that is used as a human dwelling will be included in the term 'building'

The building should be the property of another person If an owner in charge of a house professes to be an accomplice and invites another to his house to commit an offence, a conviction for house-trespass is bad in law[6].

The following are held to be buildings.—An entrance hall surrounded by a wall in which there were two doorways but no doors, and used for the custody of property[7], a courtyard, consisting of a walled enclosure with four chambers, ... or gate leading into a side street[8], a cattle yard ... one wall of which having fallen into disrepair, ... ush[9], an outer verandah of a Burmese dwelling ... the purpose of residence[11].

The following are held to be not buildings:—A courtyard of an uninhabited house[12], a walled courtyard which is not provided with a door[13], a compound [14], a cattlefold or pen with a thorn-hedge round it[15], and a *wehra* used for custody of property[16].

3. **'Vessel'.**—See s. 48, *supra*.

CASES.

Lawful entry followed by an assault is house-trespass.—The accused entered a house, remained there, and committed an assault. It was held that although the original entry might not have been unlawful, the remaining in the house was unlawful, and that as the accused unlawfully remained in the house and then committed an offence, he must be held, while unlawfully remaining, to have remained with an intent necessary to constitute the offence[17].

Attempt.—The removal of a trap-door with the intention of committing house-trespass amounts to an attempt to commit house-trespass[18]. Entry on a

1 Note N. p 168

... L. R. 400

9 *Dullee*, (1874) 6 N W. P. 307; *Ghulam*

... (1901) 4 L. B. R. 24

15 *Sucha Singh*, (1887) P. R No. 57 of 1887; *Kohmi*, (1914) P. R No 24 of 1914; *Munshi*, (1928) 26 A. L J 855.

16 *Niamat*, (1924) 6 L. L. J. 385.

17 *Bashika Chari*, (1883) 1 Weir 528.

18 *Narshi*, (1883) Unrep Cr. C. 188.

verandah coupled with an attempt to push open a door amounts to an attempt to commit criminal trespass[1].

Entry effected not to commit an offence is not house-trespass.—Where a person entered into a *havalat* (lock-up) with intent to convey or attempt to convey food to an under-trial prisoner, such act on his part was held not to amount to house trespass as conveyance of food into a *havalat* was not an offence punishable under s. 45, Prisons Act, XXVI of 1870[2]. Similarly, an entry into a cattle pen to prosecute an intrigue with an unmarried woman of over sixteen years of age was not an offence within the meaning of this section[3]. The accused entered into the house of the complainant, in his absence, with intent to have sexual intercourse with his mother, a widow, and was found out by him while remaining in the house. It was held that the accused could not be said to have had the intent to annoy or insult the complainant because an act of which a man was never intended to hear could not be said to be done with intent to insult him[4].

Where, during the absence of the complainant, the accused took possession of the house in the complainant's occupation and established there a boy alleged to be the adopted son of the complainant's father, it was held that the accused could not be convicted of this offence[5]. A girl disappeared from the house of her parents shortly before she was to be married. It was found after some time that she was living with the complainant, and some of her relations went to the complainant's house in his absence and removed the girl. There was no proof that the girl had been lawfully married to the complainant. It was held that the accused were not guilty of house-trespass as there was no proof of any intent to commit an offence or to intimidate, insult or annoy any person in possession of the house[6]. The complainant and the accused were neighbours. Their houses were divided by a wall, which the complainant claimed as his own, but which, according to the accused, was a party-wall. The accused gave a notice prohibiting the complainant from raising the height of the wall. The very next day the complainant raised the height. Whilst the complainant was absent the accused went into his house and demolished the new addition to the wall. The accused were thereupon prosecuted for the offence of house-trespass and mischief under ss. 451 and 426. It was held that inasmuch as there was a *bona fide* claim or right by the accused to the wall in dispute and as the accused had entered the complainant's house and pulled down the addition in his absence, the offences charged were not made out against the accused[7].

Where in execution of a decree certain property was attached and taken out of the house in which it was, it was held that the decree-holder was not guilty of house-trespass[8]. A house was occupied only by the owner and his concubine, who had an intimacy with the accused. The accused entered the house at her invitation in the absence of the owner and took measure to conceal himself as soon as the owner arrived who, however, arrested him. It was held that the accused was not guilty of house-trespass[9].

An officer exceeding his powers.—A police-officer is not justified by the mere fact that a person is of a suspicious character in entering his house at midnight to see whether he is in the house. Such an act is clearly a house-trespass, as it is calculated to annoy the members of the family of the suspected person and also to insult the latter person[10]. To constitute an offence of house-trespass it is not enough that there should be an entry into a house without complying with al

1 *Nga Pan Hlaing*, (1914) 8 B. L. T. 17.

2 *Lalai*, (1879) 2 All. 301. Spankie, J. *contra*. See *Nawab Ali*, (1885) 5 A. W. N. 50.

3 *Ramzan*, (1905) P. R. No. 28 of 1905.

4 *Pamba Rangadu*, (1896) 1 Weir 537; *Ambika Charan Sarkar*, (1906) 4 C. L. J. 169.

5 *Soita Biswal* v. *Dochhi Stri*, (1907) 12 C. W. N. 269.

6 *Rehana*, (1923) 5 Lah. 20.

7 *Balkrishna Narhar Velhankar*, (1924) 26 Bom. L. R. 978, 7 Bom. Cr. C. 221.

8 *Bhikam Singh*, (1917) 15 A. L. J. 808.

9 *Rupa*, (1919) 22 O. C. 121.

10 *Dorasami Pillai*, (1903) 1 Weir 529.

the formalities required by law. It further requires an intention either to commit an offence or to intimidate, insult or annoy the person in possession. Therefore,

Statutory application.—See the Madras Estates Land Act (Mad Act I of 1908), s. 212 (3).

Lurking house-trespass

443. Whoever commits house-trespass having taken precautions to conceal such house-trespass[1] from some person who has a right to exclude or eject the trespasser from the building, tent or vessel[2] which is the subject of the trespass, is said to commit "lurking house-trespass".

COMMENT.

The authors of the code say: "*House-trespass, again*, may be aggravated by being committed in a surreptitious or in a violent manner The former aggravated form of house-trespass we designate as lurking house-trespass; the latter we designate as house-breaking Again, house-trespass, in every form, may be aggravated by the time at which it is committed Trespass of this sort has, for obvious reasons, always been considered as a more serious offence when committed by night than when committed by day. Thus we have four aggravated forms of that sort of criminal trespass which we designate as house-trespass, lurking house-trespass, house-breaking, lurking house-trespass by night, and house-breaking by night

"*These are aggravations arising from the way in which the criminal trespass* is committed. But criminal trespass may also be aggravated by the end for which it is committed. It may be committed for a frolic. It may be committed in order to (commit) a murder It may also often happen that a criminal trespass which is venial, as respects the mode, may be of the greatest enormity as respects the end ; and that a criminal trespass committed in the most reprehensible mode, may be committed for an end of no great atrocity. Thus A may commit house-breaking by night for the purpose of playing some idle trick on the inmates of a dwelling B may commit simple criminal trespass by merely entering another's field for the purpose of murder or gang-robbery. Here A commits trespass in the worst way. B commits trespass with the worst object In our provisions, we have endeavoured to combine the aggravating circumstances in such a way that each may have its due effect in settling the punishment[2]".

1. 'Having taken precautions to conceal such ***house-trespass***'.—In order to constitute lurking house-trespass the offender must take some active measures to conceal his presence[3].

Entry upon the roof of a building may be criminal trespass. But it cannot sustain a conviction for lurking house-trespass[4], or for house-breaking[5].

2. 'Vessel'.—See s. 48, *supra*.

Lurking house-trespass by night

444. Whoever commits lurking house-trespass after sunset and before sunrise, is said to commit "lurking house-trespass by night".

[1] *Ali Abbas* v. *Subba Singh*, (1925) 2 O. W. N 463

[2] Note N, p. 168.

[3] *Budha*, (1916) P. R. No. 21 of 1916.

[4] [illegible]

[5] [illegible] r. L. J.

COMMENT.

Under this section the time of the entry aggravates the offence.

445. A person is said to commit "house-breaking" who commits house-trespass if he effects his entrance into the house or any part of it in any of the six ways hereinafter described; or if, being in the house or any part of it for the purpose of committing an offence[1], or, having committed an offence therein, he quits the house or any part of it in any of such six ways, that is to say:—

House-breaking.

First.—If he enters or quits through a passage made by himself, or by any abettor of the house-trespass, in order to the committing of the house-trespass.

Secondly[2].—If he enters or quits through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance; or through any passage to which he has obtained access by scaling or climbing over any wall or building.

Thirdly.—If he enters or quits through any passage which he or any abettor of the house-trespass has opened[3], in order to the committing of the house-trespass by any means by which that passage was not intended by the occupier of the house to be opened.

Fourthly.—If he enters or quits by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass.

Fifthly.—If he effects his entrance or departure by using criminal force or committing an assault, or by threatening any person with assault.

Sixthly.—If he enters or quits by any passage which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself or by an abettor of the house-trespass.

Explanation.—Any out-house, or building occupied with a house and between which and such house there is an immediate internal communication, is part of the house within the meaning of this section.

ILLUSTRATIONS.

(*a*) A commits house-trespass by making a hole through the wall of Z's house, and putting his hand through the aperture. This is house-breaking.

(*b*) A commits house-trespass by creeping into a ship at a port-hole between decks. This is house-breaking.

(*c*) A commits house-trespass by entering Z's house through a window. This is house-breaking.

(*d*) A commits house-trespass by entering Z's house through the door, having opened a door which was fastened. This is house-breaking.

(*e*) A commits house-trespass by entering Z's house through the door, having lifted a latch by putting a wire through a hole in the door. This is house-breaking.

(*f*) A finds the key of Z's house door, which Z had lost, and commits house-trespass by entering Z's house, having opened the door with that key. This is house-breaking.

(*g*) Z is standing in his doorway. A forces a passage by knocking Z down, and commits house-trespass by entering the house. This is house-breaking.

(*h*) Z, the door-keeper of Y, is standing in Y's doorway. A commits house-trespass by entering the house, having deterred Z from opposing him by threatening to beat him This is house breaking

COMMENT.

House-breaking as defined in this section is an aggravated form of criminal trespass One form of criminal trespass is the act of entering upon property, in the possession of another, with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property If the pro- [illegible] ce of criminal trespass becomes the [illegible] house-trespass is further aggravated [illegible] then the entry passes from an offence [illegible]

[illegible] sage which is not ordinary Clauses 3 to 6 deal with entry which is effected by *force*.

English law.—According to English law to constitute house-breaking there must be always an actual breaking of some part of the house, in effecting which more or less of actual force is employed, or a breaking by construction of law, where an entrance is obtained by threats, fraud, or conspiracy Under the Code the mere entry through a window not intended for human entrance will amount to house-breaking (*vide* ill. (*c*)) According to English law, if a thief enters through an aperture in a cellar window to admit light, it is not house-breaking[1].

1. 'For the purpose of committing an offence'.—It is not necessary to specify any particular offence[2]. Intention of committing any offence is sufficient.

2. Clause 2.—This clause deals with those cases where a new passage has been created by a thief When a hole is made by burglars in the wall of a house but their way is blocked by the presence of beams on the other side of the wall the offence committed is one of attempt to commit house-breaking and not actual house-breaking, and illustration (*a*) to this section does not apply.

3. Clause 3.—'Has opened'.—A door or window is not open if it is shut, though unfastened Pulling down the sash of a window is a breaking[3]. Raising [illegible]

[illegible] shed in which agricultural implements are kept amounts to house-breaking[6].

1 *Lewis*, (1827) 2 C & P 628.
2 See *Jharu Sheikh*, (1912) 16 C W. N. 696.
3 *Haines*, (1821) R & R 45
4 *Hyams*, (1836) 7 C & P 441.
5 *Samuel Hall*, (1818) R. & R. 355.
6 *Pullabhotla Chinniah*, (1917) 18 Cr. L. J. 469.

The following acts are ... breaking under the English law and will ... de:—Entry effected by taking out a glass ...[3]; lifting up a heavy flap of a cellar to ... ing down a chimney[4]; removing the fasten- ... through a broken pane of the window, and ...g[5].

...t of the prosecutrix a plan for the commis- ...he shop of the prosecutrix. The servant, ...ggestion, lent the keys of the shop to the ... one of which, on a day arranged with the ...k attached to the outer door and entered ...rosecutrix had been informed by the servant ... intended to enter the shop on the day in ... on an indictment which charged him with ...h intent to steal therein. It was held that ... that the prosecutrix knew that the accused ...eaking and entering by her servant[6].

Statutory application ... Madras Pier Act (Mad. Act V of 1863), s. 12.

446. ... house-breaking after sunset and ... is said to commit "house-breaking ...

...IMENT.

English law ... definition of house-breaking. The addition ...urns the offence into 'house-breaking by ... 'burglary' in English law. The analysis ...on of its ingredients into—(1) the breaking; ...; and (5) the intent.

...ll enter the dwelling-house of another with ... being in such dwelling-house shall commit ...ase break out of the said dwelling house in ...glary[7].

447. W... ...riminal trespass shall be punished ...ment of either description for a ...ay extend to three months, or ...h may extend to five hundred rupees, or with both.

PRA...CTICE.

Evidence. ...complainant has possession of the property in question ...nal trespass it is necessary to determine in whose ...e date of the alleged trespass[9]. Whether a party is in possession of ... property or not is a question of fact to be ascertained by taking evidence in the u...sual way. The mere fact that a decree has been given against one party by a civil Court does not determine the question of ...

1 Smith, (1820) R. & R. 417; Tucker, (1844) 1 Cox 73.
2 Perkes, (1824) 1 C. & P. 300.
3 Russell, (1833) 1 Mood. Cr. C. 377.
4 Brice, (1821) R. & R. 450.
5 William Robinson, (1831) 1 Mood. Cr. C. 327.
6 Chandler, [1913] 1 K. B. 125.
7 24 & 25 Vic. c. 96, s. 51.
8 Kalinauth Nag Choudhry, (1867) 9 W. R. ... (Cr.) 1; Parmeshwar Lall, (1921) 3 P. L. T. 34...
9 Mantripragada Venkatarama Rao, (191... 18 Cr. L. J. 761.

possession, as that party may still be in possession of the property in dispute until effect is given to the decree in due course of law[1].

(2) That the accused entered into or upon the property; or after having lawfully entered unlawfully remained there.

(3) That he so entered or remained there with the intention (*a*) to commit an offence; or (*b*) to intimidate, insult, or annoy the person in possession[2].

The Magistrate must find what the intent with which the accused committed the trespass was. He is not to leave it to inference what the intent with which he committed the trespass was[3].

"Though the prosecution must prove the existence of some one or more of the intentions mentioned in s. 441 , the proof need not be direct, that is, by the confession of the accused, showing that his intention was one of those mentioned in that section, or by the evidence of witnesses proving that he admitted to them that such was his intention. It will be enough if it is proved like any other fact (and the existence of intention is a fact) by the evidence of conduct and of surrounding circumstances"[4].

Procedure.—Cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate—Triable summarily

A Magistrate ought not to decline to go into a case of criminal trespass because the complainant does not make out his title to the land[5]. A person who enters upon property in the possession of another may be guilty of criminal trespass, without reference to the question in whom the title to the land may ultimately be found[6] The accused, after having been convicted of criminal trespass committed [illegible] n prosecuted for a further trespass by remain- [illegible] ous conviction It was held that the accused [illegible]

448. Whoever commits house-trespass shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

Punishment for house-trespass.

COMMENT.

Section 442 defines the offence of 'house-trespass', this section provides punishment for it.

PRACTICE.

Evidence.—Prove (1) that the accused committed criminal trespass[8].

(2) *That such criminal trespass was committed by entering into, or remaining in a building, tent, or vessel* [illegible] human dwelling or [illegible]

To support a conviction under this section, some one or other of the intents mentioned in s 441 must be expressly found and must not be left to inference[9].

1 *Mi Tol v. Mi Shan Ma*, (1894) 1 U. B. R. (1892-1896) 262

2 *Vujeer*, (1868) Unrep. Cr. C. 10; *Sristeedhur, Paroee v. Indrobhoosun Chuckerbutty*, (1872) 18 W. R. (Cr) 25, *Shib Nath Banerjee*, (1875) 24 W. R. (Cr.) 58; *Panjab Singh*, (1881) 6 Cal 579

3 *Durgaiya*, (1882) 1 Weir 524. See *Devaseti Gangaiya*, (1884) 1 Weir 516. See *Meajan v. Sharafatullah Khan*, (1912) 16 C. W. N. 1007; *Amavasaya Chinna Krishna Reddy v Marri Poliah*, [1912] M W. N. 395.

4 Per Banerjee and Sale, JJ., in *Balmakand Ram v. Ghansamram*, (1894) 22 Cal. 391, 406.

5 [illegible]

6 [illegible]

7 [illegible]

8 Vide s 441, sup [illegible]

9 *Durgaiya*, (1882) 1 Weir 524.

Procedure.—Cognizable—Warrant—Bailable—Compoundable—Triable by any Magistrate—Triable summarily.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed house-trespass by entering into [*or* remaining in] the building [*or* tent, *or* vessel] of AB used as a human dwelling [*or* as a place of worship, *or* for the custody of property] with intent (*specify the motive for entering into or remaining in*), and that you thereby committed an offence punishable under s. 448 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Restoration of possession.—Where possession of a house is taken by means of criminal trespass with a show of force, the Court can direct the restoration of the house to the complainant under s. 522, Criminal Procedure Code[1].

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (*d*) and 12 (2).

House-trespass in order to commit offence punishable with death.

449. Whoever commits house-trespass in order to the committing of any offence punishable with death, shall be punished with transportation for life, or with rigorous imprisonment for a term not exceeding ten years, and shall also be liable to fine.

COMMENT.

This section provides punishment for house-trespass committed with intent to commit an offence punishable with death.

It is not made necessary under this section that the offence should do any further act than house-trespass towards the commission of the 'offence punishable with death'. But to justify a conviction there should be a clear proof of the design to commit a murder or other like offence. In the absence of proof of some further act done, in addition to the criminal trespass, in the prosecution of the murderous intention, it can rarely happen that the evidence will suffice for a conviction under this section[2].

See page 79, where a list of offences punishable with death is given.

PRACTICE.

Evidence.—Prove (1) that the accused committed house-trespass[3].

(2) That the same was committed in order to commit an offence punishable with death.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed house-trespass by entering into [*or* remaining in] the building of AB, used as a human dwelling in order to the commission of an offence punishable with death, to wit——, and that you thereby committed an offence punishable under s. 449 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

1 *Rameshwar Singh*, (1925) 7 P. L. T. 285.
2 M. & M. 404.
3 *Vide*, s. 442, sup.

Punishment.—As to the Frontier District, see s. 448.

House-trespass in order to commit offence punishable with transportation for life.

450. Whoever commits house-trespass in order to the committing of any offence punishable with transportation for life, shall be punished with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

COMMENT

This section is similar to the last section. It deals with house-trespass committed with intent to commit an offence punishable with transportation for life.

As to offences punishable with transportation for life, see page 80.

PRACTICE.

Evidence.—Prove (1) that the accused committed house-trespass[1]

(2) That the same was committed in order to commit an offence punishable with transportation for life.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—See s 449, *sup.*

Punishment.—As to the Frontier District, see s. 448, *sup.*

House-trespass in order to commit offence punishable with imprisonment

451. Whoever commits house-trespass in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine; and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to seven years.

COMMENT.

This section is similar to ss. 449 and 450. It provides punishment for house-trespass committed with intent to commit an offence punishable with imprisonment. In order to constitute an offence under this section the prosecution must first establish that an offence of simple house-trespass has been committed and then satisfy the Court, in the particular case before it, that the house-trespass was committed with the object of committing a further offence punishable with imprisonment[2]

It is not necessary that the Court should be in a position to say which specific offence the accused intended to commit. It is sufficient if the evidence leaves no room for reasonable doubt that the accused intended to commit an offence[3].

CASES.

Where the accused was convicted of house-breaking, his object being to have sexual intercourse with the complainant's wife, it was held that the conviction was valid[4]. Similarly, where the accused was caught at night in the courtyard of the

[1] *Vide* s. 442, supra
[2] *Mansur Husain*, (1919) 17 A. L. J. 800.
[3] *Samban*, (1881) 1 Weir 533.
[4] (1875) 8 M. H. C. App. 6, 1 Weir 532; *Khanoom Ram*, (1920) 3 U. P. L. R. (L.) 18; *Anant Ram*, (1920) P. W. R. (Cr.) No. 8 of 1921.

complainant's premises under circumstances which showed that he had come there to commit theft of cattle, it was held that he was guilty under this section[1].

PRACTICE.

Evidence.—Prove (1) that the accused committed house-trespass[2].

(2) That the same was committed in order to commit theft, or an offence punishable with imprisonment.

When the prospective offence is that of adultery, it is necessary to show that there has been no consent or connivance on the part of the husband of the woman, the intent to commit adultery with whom is charged against the accused[3]. Where it has been shown that the husband was absent in the legitimate pursuit of his occupation, it may safely be presumed that such husband neither consented to nor connived at any adultery or immorality on the part of his wife. It seems obvious that he would be wholly ignorant of what was going on in his house and that, therefore, he could neither consent to nor connive at the same[4].

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class, if theft was committed. If any other offence punishable with imprisonment was committed, then bailable, compoundable, when permission is given by the Court before which the prosecution is pending and triable by any Magistrate—Triable summarily.

House-trespass for committing adultery.—A Magistrate is right in refusing to convict when the husband declines to complain[5]. But the omission of the husband to prosecute for adultery does not absolve the accused from criminal liability under s. 457[6].

Charge.—The charge must charge the accused with committing house-trespass with intent to commit some specific offence punishable with imprisonment[7]. It should run thus:—

I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed house-trespass by entering into (*or* remaining in) the building of AB used as a human dwelling (*or* for the custody of property), in order to commit the offence of—(*or* theft), and that you thereby committed an offence punishable under s. 451 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see s. 448.—Under this section it is not necessary to impose a sentence of fine along with a sentence of imprisonment[8].

House-trespass after preparation for hurt, assault or wrongful restraint.

452. Whoever commits house-trespass, having made preparation for causing hurt[1] to any person, or for assaulting[2] any person, or for wrongfully restraining[3] any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either de-

1 *Budha,* (1916) P. R. No. 21 of 1916.
2 *Vide* s. 442.
3 *Brij Basi,* (1896) 19 All. 74.
4 *Khanoon Ram,* (1920) 3 U. P. L. R. (L.) 18; *Kala Ram,* (1924) 1 Lah. C. 69.
5 (1869) 5 M. H. C. App. 5.
6 *Bandhu,* (1894) Cr. R. No. 11 of 1894, Unrep. Cr. C. 689.
7 *Mehar Dowalia,* (1871) 16 W. R. (Cr.) 53 [63].
8 Cr. Ref. No. 73 of 1929, decided by Patkar and Wild, JJ., on September 12, 1929 (Unrep. Bom.)

scription for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

Section 451 prescribes penalty for house-trespass committed with intent to commit an offence punishable with imprisonment. In this way it envelops the provisions of this section. But the object of the legislature in enacting this section is to provide severer punishment where house-trespass is committed in order to cause hurt to, or to assault, or to wrongfully restrain, any person.

1. 'Hurt'.—See s. 319, *supra*. Where the accused entered the complainant's house for the purpose of beating his (accused's) wife, who had taken refuge in it, it was held that the beating not being justifiable, that is, lawful, the entry amounted to criminal trespass, and a conviction under this section was good[1].

2. 'Assault'.—See s. 351, *supra*.

3. 'Wrongful restraint'.—See s 339, *supra* Where a man went with a forged warrant of arrest into a house, and took away one of the inmates against his will under the authority of such warrant, he was held guilty of house-trespass, by putting such person in fear of wrongful restraint under this section[2].

PRACTICE.

Evidence.—Prove (1) that the accused committed house-trespass[3]

(2) That the same was committed after making preparation for causing hurt to or for assaulting, or for wrongfully restraining, some person, or for putting some person in fear of hurt, assault, or wrongful restraint

The fact that the accused trespassed into the shop for the purpose of assaulting the complainant, is not sufficient to support a conviction under this section, though it is for a conviction under s. 448[4].

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed house-trespass by entering into [*or* remaining in] the building of AB, used as a human dwelling, having made preparation for causing hurt, etc., to AB; and that you thereby committed an offence punishable under s. 452 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment—As to the Frontier District, see s. 448.

Punishment for lurking house-trespass or house-breaking

453. Whoever commits lurking house-trespass or house-breaking, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

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[1] *Katakam Narasingadu*, (1882) Weir (3rd. Edn.) 329.

[2] *Nund Mohun Sirkar*, (1869) 12 W. R. (Cr.) 33

[3] *Vide* s. 442.

[4] *Fakir Chandra De*, (1921) 38 C. L J 161.

COMMENT.

This section provides penalty for the offences defined in ss. 443 and 444.

In all "house-breaking" there must be "house-trespass" and in all "house-trespass" there must be "criminal-trespass". Unless, therefore, the intent necessary to prove the offence of criminal trespass is present, the offence of house-breaking or house-trespass cannot be committed.

'Offence', in this section, means a thing punishable under the Code or any special or local law (s. 40).

English law.—According to English law to constitute house-breaking there must be an actual or constructive breaking of some part of the house.

"The word 'break' means—

(*a*) The breaking of any part, internal or external, of the building in itself, or the opening by any means whatever (including lifting, in the case of things kept in their places by their own weight) of any door, window, shutter, cellar, flap, or other thing intended to cover openings to the house, or to give passage from one part of it to another, and getting down the chimney:

(*b*) obtaining an entrance into the house by any threat or artifice used for that purpose, or by collusion with any person in the house.

The word 'enter' means the entrance into the house of any part of the offender's body, or of any instrument held in his hand for the purpose of intimidating any person in the house or of removing any goods, but does not include the entrance of part of an instrument used to break the house open"[1].

PRACTICE.

Evidence. For lurking house-trespass prove (1) that the accused committed house-trespass[2].

(2) That the accused took precautions to conceal the same.

That such concealment was from some person who had a right to exclude or eject the accused from the building, tent, or vessel which was the subject of the trespass.

For house-breaking prove (1) that the accused committed house-trespass[3].

(2) That he effected his entrance into the house or any part of it in any of the six ways mentioned in s. 445; or if he was in the house or any part of it for the purpose of commiting an offence, he quitted it in any of those six ways.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class—Triable summarily[4].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed lurking house-trespass [*or* house-breaking] by entering into a building belonging to AB and used as a human dwelling, and that you thereby committed an offence punishable under s. 453 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Punishment.—As to the Frontier District, see s. 448.

[1] Stephen's Dig. of Cr. L., Art. 341.
[2] *Vide* s. 448.
[3] *Vide* s. 448.
[4] Act I of 1903.

454. Whoever commits lurking house-trespass or house-breaking, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to ten years.

Lurking house-trespass or house-breaking in order to commit offence punishable with imprisonment

COMMENT.

The offence under this section is an aggravated form of the offence described in the last section: the aggravation being the commission of an offence punishable with imprisonment.

The latter portion of this section is framed to include the cases of house-trespassers, and house-breakers by night, who have not only intended to commit, but have actually committed, theft[1]

The accused was seen leaving the house of one S and was seized on an outcry made by a female inmate of the house He had on him jewels belonging to the female, which were ordinarily kept in an earthen receptacle in the house The time was afternoon, before sunset. Upon these facts the District Magistrate convicted *the accused of "lurking house-trespass by day for the purpose of committing theft"* under this section. It was held that there was no evidence against the accused of house-breaking, nor of the essential element of lurking house-trespass, that the offence committed by the accused was theft in a dwelling-house, and that the conviction must be under s. 380[2]

PRACTICE.

Evidence.—Prove (1) that the accused committed lurking house-trespass or house-breaking[3].

(2) That he did so in order to commit an offence punishable with imprisonment.

Oudh Rule.—In charges under ss 454 and 457 of the Indian Penal Code, [illegible]

the intention of committing it was theft, unless the circumstances themselves are such as to rebut that presumption or the prisoner prove the contrary[4].

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second classs—Triable summarily[5].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed lurking house-trespass, by entering into (*or* remaining in) a building belonging to AB, and used as a human dwelling, in order to the commission of an offence punishable with imprisonment to wit——, and that you thereby committed an offence punishable under s. 454 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* High Court)].

[1] *Zor Singh*, (1887) 10 All. 146.
[2] *Khuda Bakhsh*, (1886) P R. No 10 of 1886.
[3] *Vide* ss 443, 445, 453
[4] Circular No. 82 of 1885, Jud. Com. Oudh.
[5] Act I of 1903.

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see s. 448. As to Burma, see the Burma Laws Act, 1898, s. 4 (3) (*b*) and Sch. II.

Lurking house-trespass or house-breaking after preparation for hurt, assault or wrongful restraint.

455. Whoever commits lurking house-trespass, or house breaking, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt or of assault or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

The relationship between this section and s. 453 is the same as that between ss. 452 and 450.

This section is similar to s. 458. The only difference is that this section deals with trespass committed by day: whereas s. 458 deals with trespass committed during night.

PRACTICE.

Evidence.—Prove (1) that the accused committed lurking house-trespass or house-breaking[1].

(2) That he did so after making preparation for causing hurt, or assaulting or wrongfully restraining some person, or for putting some person in fear of hurt, assault, or wrongful restraint.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, or Presidency Magistrate, or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed lurking house-trespass (*or* house-breaking) by entering into (*or* unlawfully remaining in) the building in the possession of AB and used as a human dwelling (*or* for the custody of property) having made preparation for causing hurt to the said AB (*or* for assaulting any person or for wrongfully restraining any person, *or* for putting any person in fear of hurt *or* assault *or* of wrongful restraint), and that you thereby committed an offence punishable under s. 455 of the Indian Penal Code and within my cognizance [*or* within the cognizance of the Court of Session (*or* High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see s. 448.

Punishment for lurking house-trespass or house-breaking by night.

456. Whoever commits lurking house-trespass by night, or house-breaking by night, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

[1] *Vide* ss. 443, 445, 453.

COMMENT.

Lurking house trespass or house-breaking is punishable under s. 453; but when it is committed at night this section is applicable. Unless the intent necessary to prove the offence of criminal trespass is present, the offence under this section cannot be committed. Where the accused persons, execution creditors, broke open the complainant's door before sunrise with intent to distrain his property, for which [illegible]

CASES.

Scaling a wall.—Effecting entrance into a house at night by scaling a wall amounts to house-breaking by night[2].

Departure through a doorway.—The accused entered into a house at [illegible] der his arm from the house after [illegible] It was held that the conviction [illegible]

Entry to commit adultery.—Where a stranger, uninvited and without any right to be there, effected an entry in the middle of the night into the sleeping apartment of a woman, *a member of a respectable household, and, when an attempt* was made to capture him, used great violence in his efforts to make good his escape, it was held that the Court should presume that the entry had been made with such an intent as was provided for by this section[4]. The accused was found inside the house of the complainant's at midnight, and his presence was discovered by the wife of the complainant crying out that a thief was taking away her *hansli* (neck ornament). The evidence of the complainant clearly showed that the accused was not there with the consent or at the invitation or for the pleasure of the complainant. It was held that the accused was properly convicted under this section, it being for him to show that his intention was under the circumstances innocent[5].

In a case where it was proved that the accused was found at night inside the complainant's house where he had gone for the purpose of visiting the latter's widowed daughter-in-law, a woman of loose character, with whose knowledge and consent he had in all probability entered the room, it was held that the accused had been wrongly convicted under this section as he had none of the intentions necessary to constitute the offence described in s. 451 and could hardly have had the intention of committing the offence described in s 509[6].

PRACTICE.

Evidence.—For lurking house-trespass by night prove (1) that the accused committed lurking house-trespass[7].

(2) That the same was committed after sunset and before sunrise.

1 [illegible]
2 [illegible]
3 [illegible]
4 [illegible]
Cal.
(1894) 22 Cal 391, *Premanundo Shaha* v. [illegible]

tery · *Mullu Teli*, (1904) 16 C. P. L. R. 182
See (1869) 5 M H. C. App 5, which conflicts with (1868) 1 Weir 531, which lays down that entry into a house with the object of committing adultery will constitute this offence though the husband alone can prosecute. See *Bandhu*, (1894) Unrep. Cr. C. of Cr. R. No 11 of 1894, which also lays down that the omission of the husband to prosecute for adultery does not absolve the accused from [illegible]

For house-breaking at night prove (1) that the accused committed house-breaking[1].

(2) That the same was committed after sunset and before sunrise.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class—Triable summarily.

The splitting up of one aggravated offence into separate minor offences is prohibited, e. g., a conviction for lurking house-trespass and theft under this section and s. 380, instead of for lurking house-trespass in order to commit theft under s. 457[2].

A conviction under this section may be made even though the accused is charged with the commission of an offence under s. 457[3].

Charge.—A conviction under this section is not bad for want of the specification of the intention in the charge, but one under s. 457 cannot be sustained without such specification. In a charge under the former section, though a guilty intention must be proved, it is not necessary to prove which of the several guilty intentions the accused had; it will be enough if it is shown that the intention must have been one or other of those specified in s. 441, though it may not be certain which it was[4]. But if the accused pleads that his intention was an innocent one, it is for him to say what it was, as the burden of proving it is on him, the knowledge of that intent being specially within his knowledge[5]. Where, however, it appears that the accused has been prejudiced by the omission to frame a charge and to specify the intent, the conviction must be set aside and a re-trial ordered[6].

The charge should run as follows:—

I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed lurking house-trespass by night [*or* house-breaking by night] by entering into the building belonging to AB, and used as a human dwelling, after the hour of sunset and before the hour of sunrise, and that you thereby committed an offence punishable under s. 456 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* High Court)].

And I hereby direct that you be tried by the said Court (*in cases tried by Magistrate omit these words*) on the said charge.

Punishment.—As to the Frontier District, see s. 448.

Lurking house-trespass or house-breaking by night in order to commit offence punishable with imprisonment.

457. Whoever commits lurking house-trespass by night, or house-breaking by night, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine; and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years.

COMMENT.

The offence under this section is an aggravated form of the offence described in the last section.

1 *Vide* s. 445, sup.
2 *Ramcharan Kairi,* (1866) Beng. L. R. Sup. Vol. 488, 6 W. R. (Cr.) 39, F.B.
3 *Karali Prasad,* (1916) 20 C. W. N. 107.
4 *Balmakand Ram* v. *Ghansamram,* (1894) 22 Cal. 391.
5 *Ishri,* (1906) 29 All. 46.
6 *Jadav Mahton,* (1920) 2 P. L. T. 140.

"In order to support a conviction under s 457...it is necessary to prove that the lurking house-trespass by night or house-breaking by night was committed 'in order to the committing of any offence punishable with imprisonment': but the criminal intention which is thus made the essential element of the offence can, generally speaking, only be inferred from the circumstances of the case, and it is from those circumstances that the Court trying an offender must find whether the intention to commit some such offence as is contemplated by the section is made out, or not"[1].

CASES.

Where the door of a shop was found broken open, it was held that the conviction should have been for house-breaking by night, and not simply lurking house trespass by night[2].

A, with a view to support a fraudulent claim of title to a house, broke into it at night during the temporary absence of the owner, assaulted the owner's servant who was in charge of the house, and took forcible possession of it It was held that A was guilty under this section as he *intended to use criminal force to the servant* in possession and, therefore, intended to commit an offence[3] The accused, a previous convict, made his way into an open thorned enclosure in which goats and sheep were kept. He was disturbed and therefore ran away. It was held that on these facts the accused could not be convicted of lurking house-trespass under this section but only of attempted theft under ss 379 and 511[4]

Adultery.—Where the accused was convicted of an offence of house-breaking by night with intent to commit adultery, and the complainant, the owner

did not absolve the accused from criminal liability under this section[5] Where, on a charge under this section, it was proved to the satisfaction of the Court that the accused did enter the complainant's house in order to have sexual intercourse with a woman whom he knew was the wife of the complainant, and further that he did so without the husband's consent, and the accused was convicted, it was held that the conviction was proper. It was not necessary that the complainant should bring a specific charge of adultery[6].

PRACTICE.

Evidence.—Prove (1) that the accused committed lurking house-trespass by night[7], or house-breaking by night[8]

(2) That the same was committed to commit theft, or an offence punishable with imprisonment.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class— Triable summarily.

An attempt to commit an offence under this section is punishable under

1 Per Rattigan, J., in *Sher Singh*, (1863) P. R No. 14 of 1883

2 *Kenaram Bousee*, (1865) 4 W. R (Cr) 19.

3 *Sellamuthu* v. *Pallamuthu*, (1911) 35 Mad. 186

4 *Ghanta*, (1918) P. R. No. 13 of 1919

5 *Bandhu*, (1894) Cr R No 11 of 1894, Unrep. Cr. C. 689

6 *Kangla*, (1900) 23 All. 82. See *Chatter Singh Damai*, (1919) 3 U. B R. 194.

7 *Vide* ss 444, 456, sup

8 *Vide* ss 446, 456, sup

9 *Harnam*, (1907) P. R No 17 of 1907.

10 *Subz Ali*, (1876) P R No 2 of 1877; *Bandhu*, sup

Separate convictions.—An accused person was convicted of house-breaking by night in order to commit an offence (mischief and assault) and also under ss. 426 and 352 for the offences of mischief and assault and punished separately for each offence. It was held that the sentences were legal[1]. An accused person convicted of house-breaking followed immediately by theft is liable to punishment under this section only[2]. For further cases, see Comment on s. 71.

Offences committed in he same transaction.—Where offences under this section and s. 380 are committed in one transaction, it is very desirable that formal convictions under both sections be recorded, in order that, if the accused subsequently commits another theft, technical difficulties may not arise[3].

Charge.—In drawing up a charge the offence intended with a view to which trespass was committed should be entered in the charge.

Where the accused was convicted of house-breaking by night and of house-trespass in respect of the same acts, it was held that the second head of the charge was superfluous, inasmuch as it involved the same intention substantially as the first, which intention ought not to be applied to support two different charges[4].

The charge should run thus:—

I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, committed lurking house-trespass by night [*or* house-breaking by night] by entering into the building belonging to AB, and used as a human dwelling, after the hour of sunset and before the hour of sunrise, in order to the commission of a certain offence punishable with imprisonment, to wit the offence of——; and that you thereby committed an offence punishable under s. 457 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see s. 448.

Whipping.—In the case of a conviction of attempting to commit house-breaking by night with intent to commit theft, a sentence of whipping was annulled as being illegal[5].

Lurking house-trespass or house-breaking by night after preparation for hurt, assault or wrongful restraint.

458. Whoever commits lurking house-trespass by night, or house-breaking by night, having made preparation for causing hurt[1] to any person, or for assaulting[2] any person, or for wrongfully restraining[3] any person, or for putting any person in fear of hurt or of assault or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

COMMENT.

This section is analogous to ss. 452 and 455. It only applies to the house-breaker who actually has himself made preparation for causing hurt to any person, etc., and not to his companions as well who themselves have not made such preparation[6].

1 *Nirichan*, (1888) 12 Mad. 36.
2 *Makhru Dusadh*, (1926) 5 Pat. 464.
3 *Nga Pan Bee*, (1908) 2 B. L. T. 19; see also, *Sheobhajan Ahir*, (1920) 2 P. L. T. 125.
4 *Khandu*, (1886) Cr. R. No. 50 of 1886, Unrep. Cr. C. 302.
5 *Yella valad Purshia*, (1866) 3 B. H. C. (Cr. C.) 37.
6 *Ghulam*, (1923) 4 Lah. 399.

1. **'Having made preparation for causing hurt'.**—See s. 319, *supra*, as to the definition of 'hurt'.

2. **'Assault'.**—See s. 351, *supra*.

4. **'Wrongfully restraining'.**—See s 339, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused committed lurking house-trespass by night[1] or house-breaking by night[2]

(2) That he did as above after having made preparation for causing hurt, or for assaulting, or for wrongfully restraining some person, or for putting some one in fear of hurt, assault or wrongful restraint

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, or Presidency Magistrate, or Magistrate of the first class.

Charge.—See s. 457, *supra*.

Punishment.— As to the Frontier District, see s 448.

Grievous hurt caused whilst committing lurking house-trespass or house-breaking

459. Whoever, whilst committing lurking house-trespass or house-breaking, causes grievous hurt[1] to any person or attempts[2] to cause death or grievous hurt to any person, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

The offence under this section is an aggravated form of the offence described in the last section.

Scope.—This and the section following provide for a compound offence, the governing incident of which is that either a 'lurking house-trespass' or 'house-breaking' must have been completed in order to make a person who accompanies that offence either by causing grievous hurt or attempt to cause death or grievous hurt responsible under those sections. This section and s. 460 are not applicable where the principal act done by the accused person amounts to no more than a mere attempt to commit lurking house-trespass or house-breaking[3]. The accused one early morning were disturbed by a watchman while engaged in making a hole in the wall of the house of the complainant. Immediately upon being so disturbed they attempted [illegible] and the other two [illegible] The first accused [illegible] The former Chief Court of the Punjab quashed the conviction under these sections and recorded them under ss. 452 and 511[4].

This section is applicable not only to the particular burglar who is shown to have caused grievous hurt but to all who have taken part in the burglary[4].

1. **'Grievous hurt'.**—The grievous hurt must be caused, or the attempt must be made, during the time that the house-breaking is being committed, and not after that offence is completed, and the offender has left the premises[5]. The offence of house-breaking is complete when entry into the house is effected and any

1 *Vide* s. 444
2 *Vide* s. 446.
3 *Ismail Khan*, (1886) 8 All. 649.
4 *Imamuddin*, (1876) P. R. No. 17 of 1876; *Jaffir*, (1881) P. R. No. 2 of 1882.
5 *Janu*, (1928) 11 L. L. J. 230.
6 *Ismail Khan*, *sup*

grievous hurt, subsequently caused by the persons breaking into a house, cannot be said to be grievous hurt caused while they were committing the house-breaking. This section will not, therefore, apply where the causing of grievous hurt succeeds the entry, or indication of such intention : that is to say, it will not apply to a trespass committed by remaining on[1]. For the meaning of the term 'grievous hurt,' see s. 320, *supra*.

2. 'Attempts'.—See s. 511, *infra*.

Premeditation to cause hurt, etc., not essential.—If in the commission of the lurking house-trespass or house-breaking a personal injury of the kind here mentioned is caused or attempted to be caused, it is immaterial that it was without premeditation and sudden[2].

PRACTICE.

Evidence.—Prove (1) that the accused committed lurking house-trespass[3] or house-breaking[4].

(2) That he caused grievous hurt, or attempted to cause death or grievous hurt, to some person.

(3) That he did as above whilst engaged in committing lurking house-trespass or house-breaking.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, while committing lurking house-trespass or house-breaking caused grievous hurt to AB (*or* attempted to cause the death of AB *or* grievous hurt to AB) and that you thereby committed an offence punishable under s. 459 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—As to the Frontier District, see s. 448.

All persons jointly concerned in lurking house-trespass or house-breaking by night punishable where death or grievous hurt caused by one of them.

460. If, at the time of the committing of lurking house-trespass by night or house-breaking by night[1], any person guilty of such offence shall voluntarily[2] cause or attempt[3] to cause death[4] or grievous hurt[5] to any person, every person jointly concerned in committing such lurking house-trespass by night or house-breaking by night, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section deals with the constructive liability of persons jointly concerned in committing lurking house-trespass or house-breaking by night in the course of which death or grievous hurt to anyone is caused. It is immaterial who causes the death or grievous hurt. Every person jointly concerned in committing such house-trespass or house-breaking shall be punished in the manner provided in the section[5].

[1] *Said Ahmad*, (1927) 49 All. 864.
[2] M. & M. 407.
[3] *Vide* s. 443, sup.
[4] *Vide* s. 445, sup.
[5] *Chatur*, (1911) 8 A.L. J. 574.

This section when read with ss. 415 and 441 demands that the offence of house-breaking shall have been completed to bring an offender within its terms. The accused must be "guilty of such offence," viz., house-breaking by night. The accused and another person attempted to break into a house by night for the purpose of committing theft, and were interrupted by the inmates, one of whom was killed by one of the accused. There was no evidence to show which of the accused caused the death It was held that the accused could not be punished with transportation for life as the offence of house-breaking was attempted only and not committed[1].

1. 'At the time of the committing of ..house-breaking by night'.—This expression "is to some extent vague, but...it must be limited to the time during which the criminal trespass continues which forms an element in house-trespass, which is itself essential to house-breaking and cannot be extended so as to include any prior or subsequent time."[2]. The accused broke into the house of one T at night with intent to commit theft, being armed with deadly weapons, left the house on an alarm being raised and in the courtyard stabbed R who tried to seize them, injuring him so that he died later on. They were pursued and captured. It was held that as the stabbing was done after the house-breaking was complete this section did not apply, but that the accused were guilty of offences under ss. 457, 458 and 326[3]. The accused was one of a party of four men who broke into the house of the complainant by night and, being discovered, were running away when a neighbour caught hold of the accused whereupon some of his companions inflicted injuries upon the neighbour of which he died on the spot It was held that this section was not applicable as the offence of house-breaking by night had been completed when the neighbour arrived on the scene[4]

A man who, in the commission of lurking house-trespass by night, voluntarily attempted to cause grievous hurt to the owner of the house who tried to capture him, was held punishable under this section and not under ss 457 and 324[5].

2. 'Voluntarily'.—See s 39, *supra.*

3. 'Attempts'.—See s. 511, *infra.*

4. 'Death'.—See s 46, *supra.*

5. 'Grievous hurt'.—See s. 320, *supra.*

PRACTICE.

Evidence.—Prove (1) that the accused committed lurking house-trespass by night[6], or house-breaking by night[7]

(2) That he caused, or attempted to cause, death or grievous hurt[8].

(3) That he did as above whilst engaged in committing lurking house-trespass by night or house-breaking by night.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, jointly with certain other [illegible] by night (*or* house-breaking AB, and used as a human —at the time of committing

[1] *Saifudin,* (1874) P R No 16 of 1874, *Jowala Singh,* (1880) P. R No 12 of 1880. Explained in *Umar Din,* (1891) P. R No. 12 of 1891.

[2] Per Plowden, J, in *Jaffir,* (1881) P. R. No 2 of 1882

[3] *Sed Rasul,* (1916) P. R. No. 27 of 1916.

[4] *Muhammad,* (1921) 2 Lah 342

[5] *Lukhun Doss,* (1865) 2 W. R. (Cr) 52.

[6] *Vide* s 444, sup

[7] *Vide* s 446, sup.

[8] See *Nur Dad* and *Fatta,* (1919) 1 L. L. J. 252

COMMENT.

This section deals with the same offence as is punishable under the preceding section. The punishment under it is higher as there is a breach of trust on the part of the person to whom the receptacle is entrusted.

PRACTICE.

Evidence.—Prove points (1) to (4) as those for s. 461; and further—

(4) That the accused was entrusted with such receptacle.

(5) That he was so entrusted with it, in a closed or unfastened state.

(7) That he had no authority to open the same.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (name of accused) as follows:—

That you, being entrusted with a certain closed receptacle, to wit——, which contained [or which you believed to contain] certain property, to wit——, ... commit ... authority ... 462 of the Indian Penal Code, and within my cognizance [or within the cognizance of the Court of Session (or High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

CHAPTER XVIII.

OF OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY MARKS.

Forgery.

463. Whoever makes any false document or part of a document[1], with intent to cause damage or injury to the public or to any person[2], or to support any claim or title[3], or to cause any person to part with property[4], or to enter into any express or implied contract[5], or with intent to commit fraud[6] or that fraud may be committed, commits forgery.

Making a false document.

464. A person is said to make a false document—

First—Who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document, or makes any mark denoting the execution of a document[1], with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed[2], or at a time at which he knows that it was not made, signed, sealed or executed ;[3] or

Secondly—Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration ; or

Thirdly—Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document, knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or the nature of the alteration.

ILLUSTRATIONS.

(*a*) A has a letter of credit upon B for Rs. 10,000, written by Z. A, in order to defraud B, adds a cipher to the 10,000, and makes the sum 1,00,000, intending that it may be believed by B that Z so wrote the letter. A has committed forgery.

(*b*) A, without Z's authority, affixes Z's seal to a document purporting to be a conveyance of an estate from Z to A, with the intention of selling the estate to B, and thereby of obtaining from B the purchase money. A has committed forgery.

(*c*) A picks up a cheque on a banker signed by B, payable to bearer, but without any sum having been inserted in the cheque. A fraudulently fills up the cheque by inserting the sum of ten thousand rupees. A commits forgery.

. thout
. sum
. ients.
. rupees.
B commits forgery.

(e) A draws a bill of exchange on himself in the name of B without B's authority, intending to discount it as a genuine bill with a banker and intending to take up the bill on its maturity. Here, as A draws the bill with intent to deceive the banker by leading him to suppose that he had the security of B, and thereby to discount the bill, A is guilty of forgery.

(f) Z's will contains these words—"I direct that all my remaining property be equally divided between A, B and C". A dishonestly scratches out B's name, intending that it may be believed that the whole was left to himself and C. A has committed forgery.

(g) A endorses a Government promissory note and makes it payable to Z or his order by writing on the bill the words "Pay to Z or his order" and signing the endorsement. B dishonestly erases the words "Pay to Z or his order" and thereby converts the special endorsement into a blank endorsement. B commits forgery.

conveyed the estate to B before he conveyed it to Z. A has committed forgery.

(i) Z dictates his will to A. A intentionally writes down a different legatee from the legatee named by Z, and, by representing to Z that he has prepared the will according to his instructions, induces Z to sign the will. A has committed forgery.

(j) A writes a letter and signs it with B's name without B's authority, certifying that A is a man of good character and in distressed circumstances from unforeseen misfortune, intending by means of such letter to obtain alms from Z and other persons. Here, as A made a false document in order to induce Z to part with property, A has committed forgery.

(k) A without B's authority writes a letter and signs it in B's name certifying to A's character, intending thereby to obtain employment under Z A has committed forgery, inasmuch as he intended to deceive Z by the forged certificate, and thereby to induce Z to enter into an express or implied contract for service.

Explanation 1[4].—A man's signature of his own name may amount to forgery.

ILLUSTRATIONS.

(a) A signs his own name to a bill of exchange, intending that it m.y believed that the bill was drawn by another person of the same name. A committed forgery.

(b) A writes the word "accepted" on a piece of paper and signs it with Z's name, in order that B may afterwards write on the paper a bill of exchange

A

it

be believed that it was endorsed by the person to whose order it was payable here A has committed forgery.

(d) A purchases an estate sold under execution of a decree against B. B, after the seizure of the estate in collusion with Z, executes a lease of the estate to

at a nominal rent and for a long period, and dates the lease six months prior to the seizure, with intent to defraud A, and to cause it to be believed that the lease was granted before the seizure. B, though he executes the lease in his own name, commits forgery by antedating it.

(e) A, a trader, in anticipation of insolvency, lodges effects with B for A's benefit, and with intent to defraud his creditors; and in order to give a colour to the transaction, writes a promissory note binding himself to pay to B a sum for value received, and antedates the note, intending that it may be believed to have been made before A was on the point of insolvency. A has committed forgery under the first head of the definition.

Explanation 2[5].—The making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, may amount to forgery.

ILLUSTRATION.

A draws a bill of exchange upon a fictitious person, and fraudulently accepts the bill in the name of such fictitious person with intent to negotiate it. A commits forgery.

465. Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Punishment for forgery.

COMMENT.

The offence of forgery is defined in ss. 463 and 464 of the Code. Under s. 463 the making of a false document with any of the intents therein mentioned is forgery and s. 464 sets forth when a person is said to make a "false document" within the meaning of the Code.

The definition of forgery in the Code is not as simple and clear as it is in common law. Forgery in England is not defined by statute. It is defined in common law as the fraudulent making (or alteration) of a writing to the prejudice of another man's right[1].

Section 463.—Scope.—Section 463 "contemplates two classes of intents, and it is clear...that it is not an essential quality of the fraud mentioned in the section that it should result in or aim at the deprivation of property. If this be so, it cannot be supposed that the definition of a false document (s. 464), which is but a part of the definition of forgery, requires as a condition of criminality an intent different in its quality and its aims from that prescribed by s. 463"[2].

Ingredients.—The elements of forgery are—

1. The making of a false document or part of it.
2. Such making should be with intent to
   (a) cause damage or injury to (i) the public, or (ii) any person; or
   (b) support any claim or title; or
   (c) cause any person to part with property; or
   (d) enter into any express or implied contract; or
   (e) commit fraud or that fraud may be committed.

1 Blackstone, Vol. IV, p. 245.

2 *Abbas Ali*, (1897) 25 Cal. 512, 521, F.B., overruling *Haradhan's* case, (1892) 19 Cal. 380.

1. 'Whoever makes any false document or part of a document'.—To

of a 'false document' is sufficient.

is explained in s. 464. The

gery. A person who is not the writer of a forged document cannot be charged with committing the substantive offence of forgery. If he has caused such a 'false document' to be made he will be guilty of abetment[1]. It is not necessary that the document should be published or made in the name of a really existing person[2]. But "it is essential that the false document

which, if true,

capable of effec

of the matter e

it to be, and in

amount to this offence, although a statute requires the deed in a particular form, or to comply with certain requisites, and the forged deed is not in the form, or does not comply with those requisites[5].

The assertion of a false claim in a document does not constitute the document a false one, when it is executed by the party who purports to execute it and there is no intention of causing a belief that it was executed by some other person, real or fictitious. A, who was not the son, natural or adopted, of the deceased B, executed a deed of mortgage of certain properties of B in favour of C In the body of the document A was described as the son of B, though no such description appeared in the signature. A was known to C for a long time, and A had no intention of causing it to be believed that the document was executed by any other person than himself. It was held that A was not guilty of making a 'false document'[6].

"Forgery supposes the possibility of a genuine document, and that the false document is not as good as the genuine document, and that the one is not as efficacious for all purposes

every concoction of a doc

a promissory note from B,

due upon it. B finds that the document in possession of A purports to be a copy of a promissory note by B If B had never given a promissory note, A cannot be convicted of forgery or of uttering a forged document, but of cheating he may be.

If the false document is incomplete in such a material way as no one will be

But if a forged document is not wholly void for want of certain form the maker of it will be guilty of forgery[10].

2. 'Intent to cause damage or injury to the public or to any person'.—When a false document is made, with 'intent to cause damage or injury to the public or to any person', it is not necessary to prove that in making the document the accused knew that the document might injure, but it must be proved that it was his intention that it should injure another[11].

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7 Per Bramwell, B., in *John Smith*, (1858) 8 Cox 32, 37.

8 Per Byles, J., in *ibid.*

9 *Richards*, (1811) R & R 193; *Daniel Randall*, (1811) R. & R 195, *Richard Pateman*, (1821) R. & R. 455; *Butterwick*, (1839) 2 M & Rob. 196.

10 *Thomas Lyon*, sup.

11 *Fela Hossein*, (1881) 10 C L. R. 184.

wrongful gain of property. The Legislature advisedly uses the terms 'dishonestly' and 'fraudulently'...they are used to denote two different things...The intention to defraud need not necessarily be to obtain something which a person is not legally or equitably entitled. It is sufficient if by means of the perpetration of the fraud somebody is defrauded...In order to do a thing fraudulently it is not necessary that the person doing it should intend, or the doing of it should have the necessary consequence of, causing wrongful loss to any person. It is sufficient if the doing of it is intended to defraud someone without ultimately acquiring unlawful gain or causing wrongful loss"[1]. A person is said to do a thing 'fraudulently' if he does that thing with intent to defraud, but not otherwise (s. 25). This "word is used in ss. 471 and 464 together with the word 'dishonestly' and presumably in a sense not covered by the latter word. If, however, it be held that fraudulently implies deprivation either actual or intended, then apparently that word would perform no function which would not have been fully discharged by the word dishonestly and its use would be mere surplusage. So far as such a consideration carries any weight, it obviously inclines in favour of the view that the word 'fraudulently' should not be confined to transactions of which deprivation of property forms a part"[2]. "Those decisions...which proceed on the ground that an act is not fraudulent unless it causes or is intended to cause loss or injury to some one would seem to take too narrow a view of the meaning of the word 'fraudulently' as used in the Code"[3].

The making of a document untrue in certain particulars for the mere purpose of deceiving, does not amount to making a false document. It must be shown that it was made with such an intention as is implied in the term 'fraudulently' or in the term 'dishonestly'[4]. A person cannot be convicted of fabricating a false document where his object in antedating a deed is simply to clear up matters and no fraudulent and no wrongful loss or wrongful gain is caused to any person thereby[5]. Where a hand-note bearing a certain date bore the genuine thumb impression of the executant, but it was found in fact to have been executed subsequently, and there was absence of evidence that the antedating by the creditor was done with the object of making any wrongful gain to himself or causing wrongful loss to the executant, it was held that the necessary element of fraud or dishonesty was wanting in the case and that therefore the offence of forgery was not committed[6].

"To execute false valuable securities in order to render inoperative genuine valuable securities, is an act which is,...an act done with a fraudulent intent. It does not...cease to be fraudulent merely because the genuine document may by a distinct act of fraud be withheld from the rightful owner. The true description of such a transaction is that fraud is committed in order to counteract fraud, a description which is of no avail to the person by whom the false documents are made"[7].

'Fraudulently': 'intent to commit fraud, etc.'—"Possibly a distinction may be drawn between doing a thing 'with intent...that fraud may be committed' (s. 463) and doing a thing 'fraudulently' (s. 464). Such a distinction seems to be recognised in s. 239 of the Code. But to my mind no distinction can be drawn between doing a thing 'with intent to commit a fraud' (s. 463) and doing a thing 'fraudulently' (s. 464). Although the words 'with intent to commit a fraud' are not expressly defined, I think they mean the same thing as 'fraudulently', i.e., to

1 Per Devadoss, J., in *Sivananda Mudali*, (1925) 27 Cr. L. J. 994, 996, 999.
2 *Abbas Ali*, (1896) 25 Cal. 512, 521, overruling *Haradhan*, (1892) 19 Cal. 380, which is followed in *Bala*, (1892) Unrep. Cr. C. 627.
3 Per Benson, J., in *Kotamraju Venkatrayadu*, (1905) 28 Mad. 89, 113, F.B., contra, Subrahmania Ayyar, J., in *ibid*, p. 103.
4 *Guddappa*, (1879) 1 Weir 542.
5 *Sudarson Behara*, (1926) 8 P. L. T. 104.
6 *Gobind Singh*, (1926) 5 Pat. 573.
7 Per Plowden, J., in *Fakir Muhammad*, (1884) P. R. No. 4 of 1885, p. 9.

say, person does a thi nts specified in s. 464. It also follows, as it seems to me, that the offence is complete if a document, false in fact, is made with intent to commit a fraud, although it may not have been made with any one of the other intents specified in s 463"[1].

'Makes'.—The simple making of a false document constitutes forgery[2]. "The 'making' of a document, or part of a document, does not mean 'writing' or 'printing' it, but signing or otherwise executing it; as in legal phrase we speak of 'making an indenture' or 'making a the writing out of the form of the instru or note. The fact that the word 'makes' the words 'signs' 'seals,' or 'executes' or 'makes any mark' 'denoting the execution, etc.', seems to me very clearly to denote that this is its true meaning What constitutes a false document, or part of a document, is not the writing of any number of words which in themselves are innocent, but the affixing the seal or signature of some person to the document, or part of a document, knowing that the seal or signature is not his, and that he gave no authority to affix it In other words, the falsity consists in the document, or part of a document, being signed or sealed with the name or seal of a person who did not in fact sign or seal it"[3]. Stokes[4] in reference to this case says: "Why then were 'make' and 'made' used as well as 'signs', 'executes', 'signed', 'executed' ?" In an English case it has also been held tha positive impression on glass by photography is a making althou *from until it* distinguished and it was held that this Court taking the same view has held that the word 'makes' means anything other than makes, that is to say, creates or brings into existence. Where a document purporting to be a will was never completed and remained ineffective for want of dates, it was held that it was "made" within the meaning of s. 464[7]

The meaning given to the word 'making' in English law is very wide.

Making a false document does not consist in writing without doing anything towards its execution[8].

In England it has been held that it is forgery to make a deed fraudulently, with a false date, when the date is a material part of the deed, although the deed is between the persons by and between whom it The antedating of a document is not forgery, to the prejudice of anyone[10]

'Signs seals, or executes'.—Signing or sealing a document completes its document which is invalid

Forgery at common law must be of some writing or the putting the name of a painter upon the copy of one of his pictures, in order

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[1] Per Arnold White, C. J., in *Kotamraju Venkatrayudu*, (1905) 28 Mad. 90, 95, F B.

[2] *Sheefait Ally*, (1868) 10 W. R. (Cr) 61, 2 Beng L. R (A. Cr. J) 12

[3] Per Garth, C. J., in *Riasat Ali*, (1881) 7 Cal. 352, 355.

[4] See Anglo-Indian Codes, Vol. I, p 269.

[5] *Peter Rinaldi*, (1863) L. & C 330.

[6] *Krishtappa Khandappa*, (1925) 27 Bom. L. R. 599, 8 Bom. Cr. C. 41.

[7] *Chatra Malik*, (1928) 10 Lah 265

[8] *Lim Hoe*, (1894) 1 U. B R. (1892-1896) 279

[9] *William Ritson*, (1869) L. R. 1 C. C. R. 200.

[10] *Gobind Singh*, (1926) 5 Pat 573.

[11] *Collins*, (1844) 1 Cox 57.

[12] Mad H C Pro.

that it may be passed off as the original, is not a forgery at common law, but is cheating[1]. Under the Code this will amount to forgery.

2. **'With the intention of causing it to be believed that such document...was made...by the authority of a person by which or by whose authority he knows that it was not made..., etc.'**—The making of a false document should be for one of the two purposes specified in this clause. The document should not have been made, etc., by the authority of the person by whom it is alleged to have been made or if it is made by his authority then it must not be at a time at which it is alleged that it was made, signed, etc.

3. **'At a time at which he knows that it was not made, signed, sealed or executed'.**—These words are to be read distributively and are not governed by the preceding words 'by or by the authority, etc.'[2]. To execute, with fraudulent intent, a document purporting to have been executed on a date other than the one on which it was actually executed, is a forgery[3]. *Antedating* a document to save an appeal constitutes forgery[4]. It is forgery to make a deed fraudulently with a false date when the date is a material part of the deed, although the deed is in fact made and executed by and between the person by and between whom it purports to be made and executed[5].

Cases.—Clause 1.—False document should have been actually made.—Where a person gave orders for the printing of certain receipt forms similar to those used by a certain company, and corrected the proofs of the same, it being his intention to use the receipt forms in order to commit a fraud, it was held that he could not be convicted of forgery until one of the printed forms had been converted by him into a false document, nor of an attempt to commit forgery until he had done some act towards making one of the forms a false document; until a form had been converted into a document, all that was done consisted in the mere preparation for the commission of an offence[6]. But this case has not been followed by the Allahabad High Court in *R.* v. *MacCrea*[7], the charge in which was approved by the Privy Council[8].

The mere fact that a document bearing a certain date was written on paper bearing an embossed stamp with a figure denoting a later date was held not sufficient to support a charge of forgery in the absence of evidence that the paper could not have been manufactured at the date the document bore[9].

The accused went to the market and after making some purchases tendered a cheque to the shop-keeper who called a *poddar* who cashed it for a small commission. On being presented the cheque was dishonoured by the Bank. The accused was tried in the High Court Sessions on charges of forgery and cheating and convicted. It appeared that the brother of the accused, G. R. Martindale, had an account with the Bank and the signature on the cheque was only Martindale. The evidence was that he made an alteration in the date on the cheque in the presence of the shop-keeper and the *poddar* as though he were the drawer but made no representation about G. R. Martindale. It was held that inasmuch as the accused had no intention of inducing in the minds of the shop-keeper and the *poddar* the belief that the cheque had been signed by his brother and had no such intention in regard to the Bank, the cheque in question was not a false document and consequently the charge of forgery failed; that in the circumstances of the case there was dishonest concealment of facts on the part of the accused and he

[1] *Closs*, (1857) 7 Cox 494.
[2] *Ganesh Bhikaji*, (1895) Cr. R. No. 36 of 1895, Unrep. Cr. C. 772.
[3] *Rangaswami Chettyar* v. *Maung Po Ku and Three*, (1927) 6 Ran. 49.
[4] *Sookmoy Ghose*, (1868) 10 W. R. (Cr.) 23; *Amelia Taylor*, (1843) 1 C. & K. 213. But see *Hurjee Mull* v. *Imam Ali Sircar*, (1903) 8 C. W. N. 278.
[5] *William Ritson*, (1869) L. R. 1 C. C. R. 200.
[6] *Riasat Ali*, (1881) 7 Cal. 352.
[7] (1893) 15 All. 173.
[8] (1893) 20 I. A. 90.
[9] *Sesha Charlu*, (1891) 1 Weir 540.

was guilty of cheating[1]. Where the accused counterfeited letters or marks imprinted on trees and intended to be used as evidence that the trees had been passed for removal by the Ranger of a forest, it was held that he was guilty of making a false document[2].

Entries.—The accused made certain entries in his ledger which consisted of rough loose sheets, showing that certain sums of money had been paid to the prosecutor, which, in fact, had not been repaid. It was held that he was guilty of forgery[3]. A beat constable who wrote in his note-book the signature of a head-man whose village he had not visited was held thereby not to have committed this offence[4]. Where the accused was requested to make an entry in a book of account belonging to the complainant to the effect that he was indebted to the complainant in a certain sum found due on a settlement of accounts, instead of making this entry as requested, he entered in a language not known to the complainant that the sum had been paid to the complainant, it was held that he had committed not forgery but an attempt to cheat[5] The accused sold for Rs 40 a bullock to the complainant who paid him one rupee as earnest money and promised to pay the balance at a certain time. An entry to this effect was made in the accused's account book and was thumb-marked by the complainant Subsequently, a clause was added by the accused on the credit side of the account book without the sanction of the complainant which said that if the amount was not paid as agreed upon, the creditor would take one and half times the principal, including interest. It was held that no false document had been made by the accused within the meaning of s. 464[6].

The accused transferred the whole of his property in favour of his wife but before registering the sale-deed mortgaged the property to F. The sale-deed was, however, [illegible] nquiry at the Registrati [illegible] tgage deed was also regist [illegible] It appeared [illegible]

[illegible] It was held that the accused was guilty [illegible] g, as he must be presumed to know the [illegible] usly could not have been absent from his [illegible] it that he was thereby attempting to defraud [illegible]

[illegible] entries in books shewing certain donees of land as proprietors of their holding merely without any share in the *shamilat*, whereas previously they were shown as full proprietors The deeds of gift made no mention of the *shamilat* and it was therefore a moot point whether the gifts covered a share in the *shamilat* or not and prima facie the new entries made by the accused were correct. It was held that as it could not be said that the accused (who acted apparently bona fide) made the entries with intent to defraud, or dishonestly, he did not make a false document[8]. The accused who supervised labourers employed in repairing a public road made entries of payment in muster rolls in excess of the actual payments, it was held that he was not guilty of forgery[9]

1 *Martindale*, (1924) 29 C. W. N. 447.

2 *Krishtappa Khandappa*, (1925) 27 Bom. L. R. 599, 8 Bom. Cr C. 41.

3 (1865) 1 Mad. Jur. 11, 1 Ind. Jur. N. S. 46.

4 *Nga Aung Ba*, (1899) 1 U. B. R. (1897-1901) 356.

5 *Kurju Nayar*, (1888) 12 Mad. 114, *Balwant*, (1892) Cr. R. No. 15 of 1892, Unrep. Cr. C. 595, *Jawala Ram*, (1895) P. R. No 12 of 1895.

6 *Badan Singh*, (1922) 3 Lah. 373.

7 *Abdul Rashid Khan*, (1913) 12 A. L. J. 101.

8 *Muhammad Sirdar*, (1914) P. R. No 25 of 1914.

9 *Ram Ghulam Singh* [illegible] J. [illegible]

Unauthorized signature.—A petition praying that a fishery lease might be transferred from A to B, and purporting to be signed by A and B, was presented to the Deputy Commissioner by A. B was not present but his son was, and admitted having signed his father's name. He was subsequently prosecuted, although no attempt was made to show that he had acted fraudulently and without his father's authority, and was convicted of fabricating false evidence. It was held that the conviction was bad because the writing of B's name by his son did not constitute a false entry and there was no intention that it should appear in evidence in any proceeding[1]. A, who was not the son, natural or adopted, of the deceased B, executed a deed of mortgage of certain properties of B in favour of C. In the body of the document A was described as the son of B, though no such description appeared in the signature. A was known to C for a long time, and A had no intention of causing it to be believed that the document was executed by any other person than himself. It was held that A was not guilty of making a false document within the meaning of s. 464. The assertion of a false claim in a document will not constitute the document a false one, when it is executed by the party who purports to execute it and there is no intention of causing a belief that it was executed by some other person, real or fictitious[2].

False attestation.—If a person falsely puts his name down as an attesting witness to the signature of somebody who he knows has never signed at all, he is guilty of forgery just as well as the scribe[3].

Personation at an examination.—A falsely represented himself to be B at a University examination, got a hall ticket in B's name, and headed and signed answer papers to questions with B's name. It was held that A had committed the offence of forgery and cheating by personation[4].

Vakalatnamah.—The signing of a vakalatnamah in the name of co-decree-holders without their authority to do so, and delivering it to a Vakil with instructions to file a petition, stating that the debt had been satisfied, and praying that the case may be struck off the file, is held to be a forgery[5].

Voting paper.—Where a person obtains a voting paper by putting a thumb impression in the name of another and passes it on in that name he commits forgery[6].

Signing a petition in the name of another.—Where A signed B's name to a petition presented by C to a Mamlatdar, requesting his summary assistance, under Bombay Regulation XVII of 1827, for recovery of rents from B's tenants, it was held that even if A had no authority from B to sign his name, and even if A wished to deceive the Mamlatdar into the belief that it was B himself who had signed the petition, still, if there had been no intention to defraud anybody, or if no wrongful gain or wrongful loss could have been caused to A or B, A's act did not constitute forgery. Avoidance of litigation is no wrongful loss to Government[7].

Fabricating a letter or certificate of recommendation for a post.—The accused, who was a copyist in the Sub-divisional Office at B, applied for a clerkship then vacant in that office. An endorsement on his application, recommending him for the post and purporting to have been made by the Sub-divisional Officer of B, was found to have been falsely made by the accused. The application was accompanied by a letter, also fabricated by the accused, purporting to be from the Collector to the Sub-divisional Officer at B, informing the latter officer that he, the Collector, had selected the accused for the vacant post. The Sub-divisional Officer, having some suspicions as to the genuineness of this letter, wrote a demi-

1 *Po Shin*, (1908) 4 L. B. R. 45.
2 *Adaikalammai* v. *Raman*, (1908) 32 Mad. 90.
3 *Ambar Ali*, [1929] Cr. C. (Cal.) 194.
4 *Appasami*, (1889) 12 Mad. 151.
5 *Gyanee Ram*, (1866) 6 W. R. (Cr.) 78.
6 *Ram Nath*, (1924) 47 All. 268.
7 *Bhavanishankar*, (1874) 11 B. H. C. 3.

official letter to the Collector to ascertain whether he had really written it; and this being posted in the local post office the accused fabricated a third document, purporting to be a letter from the Sub-divisional Officer to the postmaster asking him to stop the despatch of the demi-official letter. It was held that the accused had committed forgery with regard to the first two documents but with regard to the third, it could not be said that he falsely made it either dishonestly or fraudulently within the meaning of s. 464[1]. The accused applied to the Superintendent of Police at Poona for employment in the Police force. In support of his application he presented two certificates which he knew to be false. One of these certificates was a wholly fabricated document, whilst the other was altered by several additions made subsequently to the issue of the certificate. It was held that the accused was guilty of offences under ss. 463 and 471[2]. Where a private candidate for the Matriculation examination of the University of Madras, for the purpose of being admitted to the examination, forwarded to the Registrar of the University, as required by bye-laws, a certificate that he was of good character and that he had completed his twentieth year which purported to be signed by the Head Master of a recognized school but was in fact not signed by him, but was signed by the candidate in his own writing, it was held that the certificate was a forged document within the meaning of ss. 467 and 464[3]. A submitted to the proper authority an application for an appointment in the Land Record Department. This application contained false statements and to it was attached a forged certificate It was held that A had attempted to obtain wrongful gain and that he had acted 'dishonestly'[4].

[illegible] were in the habit of [illegible] tion, touching their [illegible] In order to enable [illegible] necessary to produce [illegible] ea, for not [illegible] of inducing [illegible]

[illegible] Muhammadan with the intention [illegible] marriage with her and to support [illegible] ur, it was held that the document was not a false document[6].

Fabricating a receipt for a debt written off by a creditor—The accused, in order that he might obtain the annulment of an order adjudicating him an insolvent, and thereafter that he might be in a position to tender for municipal contracts, produced before the receiver in insolvency a document which purported to be a receipt from a creditor for payment of debt which the creditor had in fact written off as irrecoverable. It was held that in respect of the use of this receipt the accused was guilty under this section read with s. 471[7].

Giving a false name and address in a certificate of purchase.—A person lawfully entitled to possess arms and ammunitions signed the prescribed certificate of purchase of the same in the name of another with an address not his own, and thereby decei [illegible] and defeated the object of the certifica [illegible]. The act of the accused was not 'dishc [illegible]

[illegible] cheat.

[2] *Khandusingh*, (1896) 22 Bom. 768; *Moah*, (1858) Dears, & B. 550.

[3] *Kotamraju Venkatrayadu*, (1905) 28 Mad. 90, 1 Weir 538a, F.B.; *Chanan Singh*, (1928) 10 Lah. 945.

[4] *Nga Ba Thein*, (1922) 4 U. B R. 174.

[5] *Francis Toshack*, (1849) 4 Cox 38

[6] *Gunjar Mohammad* v. *Shuruz Ali*, (1922) 23 Cr. L J. 723.

[7] *Abdul Ghafur*, (1923) 43 All. 225.

[8] *Causley*, (1915) 43 Cal. 421.

Fabricating an order purporting to have issued from a superior to a subordinate officer.—One Piari, the wife of Amir, left her husband's house. Amir put in a petition at the police station asking that a search might be made for the missing woman, and he also employed a pleader, one Ali Zohad, to assist him in discovering the whereabouts of Piari. Ali Hassan, the son of Ali Zohad, and a clerk employed in the office of the District Superintendent of Police, forged two orders purporting to be orders of the District Superintendent of Police, the first intimating that the woman Piari was with one Sibni, the wife of Ghisu, weaver, and that the Sub-Inspector should be directed to hand her over to the petitioner (Amir), and the second directing the Sub-Inspector of Kydganj to hand the woman over to the petitioner. It was held that in fabricating these two documents Ali Hassan had acted fraudulently and had committed forgery[1].

Conviction will be for abetment if it is not proved that the accused himself made the document.—Where a Police Constable's character and service roll in his custody was found to have been tampered with in this way, that a page, apparently containing unfavourable remarks to the constable, had been taken out, and a new page with favourable remarks, purporting to have been written and signed by various superior officers of Police, had been inserted in its place, the intent being to favour the chances of his promotion; it was held that this interpolation amounted to forgery, but that, inasmuch as it was not proved that the constable himself prepared and inserted the false page, he was guilty of abetment only[2].

But a person consenting to act under a *mookhteearnamah* (power of attorney) and attaching his name in token of such consent, does not become a maker of the *mookhteearnamah* or a forger if it turns out to be forged[3].

Second clause.—This clause requires dishonest or fraudulent cancellation or alteration of a document in any material part without lawful authority after it has been made or executed by a person who may be living or dead.

The alteration must be in a material part of the document. Thus the interpolation of the name of a person as an attesting witness to a document not required by law to be attested subsequent to its execution and registration is not an alteration of the document in a material part[4].

Where the date in a bond was altered, even though the alteration was not required to bring the claim within limitation[5]; and where a document was deliberately tampered with to support a just claim in Court and to counteract a fraud perpetrated by the opposite party[6], this offence was held to have been committed. But where the vendees of a plot of land altered the number of which the land was described in the deed of sale, because such number was not the right number, and used it as evidence in a suit; the alteration of the deed was held not to amount to forgery. The Court said: "The identity of the property which the deed of sale purported to convey could not possibly be affected by the alteration of the figures, and the substitution of one number for the other could not possibly defraud any one or have the effect of causing wrongful loss or wrongful gain to any person. If the object of the alteration were to make it appear that the property intended to be conveyed by the sale-deed was other than that which it actually did purport to convey, the case would of course have been different... The identity of the property which the sale-deed purported to convey being unaffected, the alteration cannot fall under the definition of making a false document"[7]. Similarly, where the date of a document, which would otherwise not have been presented for registration within time, was altered for the purpose of getting it registered, the offence com-

1 *Ali Hasan*, (1906) 28 All. 358.
2 *Muhammad Saeed Khan*, (1898) 21 All. 113; *Ramgopal Dhur*, (1868) 10 W. R. (Cr.) 7.
3 *Burjo Barick*, (1866) 3 W. R. (Cr.) 70.
4 *Surendra Nath Ghosh*, (1910) 14 C. W. N. 1076, 12 C. L. J. 277.
5 *Ram Narain*, (1881) P. R. No. 14 of 1881.
6 *Gobinda Mal*, (1895) P. R. No. 6 of 1895.
7 *Fateh*, (1882) 5 All. 217, 220.

mitted was not forgery but fabricating false evidence because there was nothing to show that the act was done dishonestly or fraudulently as the bond was genuine and the accused did not intend to support a false claim by a false bond[1]. A promissory note expressed no time for payment, and while it was in the possession of the payee, the words "on demand" were added without the assent of the maker.

A Mukhtear who appeared for the plaintiff in an ejectment suit before a Rent Court, in open Court but without the permission of the Court, or even of the officer of the Court in whose custody the record was, took the plaint in the case and altered it so as to represent the plaintiff as claiming ejectment of the defendant from one field more in addition to those mentioned originally in the plaint It did not appear whether the plaintiff was or was not entitled to eject the defendant *from that field, but inasmuch as the alteration was made openly and the prosecution* had not established that it was made fraudulently or dishonestly, it was held that upon those facts the Mukhtear could not properly be convicted of forgery[3]

Third clause.—This clause requires that a person must fraudulently or dishonestly cause any person to sign, seal, execute, or alter a document knowing that such person could not by reason of (*a*) unsoundness of mind, or (*b*) intoxication, or (*c*) *deception know the contents of the document or the nature of the* alteration.

Where the accused obtained a genuine signature upon a false document, by inserting the document in a heap of papers placed for signature before the person signing it, it was held that the accused had not committed an offence under this section, on the ground that no deception was practised on the person signing it to prevent him from knowing the nature of the document[4]. It must be shown that the accused practised deception, so as to prevent a person from knowing the nature of the document, before the accused can be found guilty. Where the accused, a *mohurrir*, in a Registry Office, was charged with making false endorsements of registry on the bank of certain deeds which endorsements were signed by the Registrar, it was held that, before he could be convicted of forgery, it must be shown that the Registrar, in consequence of deception practised upon him by the

knowing that he was not the real person in whose favour it was drawn, indorse it, he is guilty of forgery[6].

It is a false document if the offender makes it falsely in the name of any other person, although that name happens also to be the offender's own name. A man who makes a promissory note in his own name without any false description or addition and with an honest intention, if he afterwards uses or attempts to use the note, pretending that it is signed by another person of the same name, does not by this false representation make the promissory note 'a false document' It was a genuine document when he signed it and does not become false by his subsequent use of it for the purpose of cheating. In such cases as those mentioned in illustrations (*d*) and (*e*) a man signs or executes a document in his own name which is false in a material part, and is calculated to induce another to give credit to it as genuine and authentic when it is false and deceptive[7].

[1] *Mir Ekrar Ali*, (1880) 6 Cal. 482.
[2] *Aldous* v. *Cornwell*, (1868) L R. 3 Q B. 573.
[3] *Bisheshar Dayal*, (1905) 25 A. W. N. 93.
[4] *Nujeebutoolah*, (1868) 9 W. R. (Cr.) 20.
[5] *Dwarkanath Ghose*, (1873) 20 W. R. (Cr.) 49.
[6] *Mead* v. *Young*, (1790) 4 T. R. 28
[7] M. & M. 415.

5. Explanation 2.—"As to the charge of forgery it is wholly immaterial whether the name forged is that of a fictitious person who never existed or of a real person. It is as much a forgery in the one case as in the other provided the fictitious name is assumed for the purpose of fraud in the particular case under trial...There is, however, no doubt that an intention to defraud is an essential ingredient; but it is sufficient to show that there was an intention to defraud generally. Whether there was an intention to defraud or not is a question of fact to be determined with reference to the special circumstances of each case"[1].

As to how far personating the true man or assuming a fictitious character will affect this offence, the following principles, as laid down in *Dunn's* case[2], are briefly summarised by East[3]. "First, that if a person give a note or other security as his own note or security, and the credit thereupon be personal to himself without any relation to another, his signing such a note with a fictitious name may indeed be a cheat, but will not amount to forgery: for in that case it is really the instrument of the party whose act it purports to be, and the creditor had no other security in view. But secondly, that if a note be given in the name of another person either really existing or represented so to be, and in that light it obtain a superior credit, or induce a trust which would not have been given to the party himself, it is then a false instrument, and punishable as forgery. Thirdly, that the law would be the same, though the note or security were thus falsely subscribed in the presence of him who lent his money upon it, if the imposter and the party whose name is made use of were both strangers to him; for then he could not know that such imposter was not really the person whose name he assumed, and therefore the other would be equally deceived". The first of these propositions was followed in a case where the accused, Robert Martin, in payment for a pony and cart purchased by him from the prosecutor, drew a cheque in the name of William Martin in the presence of the prosecutor upon a bank at which he, the accused, had no account, and gave it to the prosecutor as his own cheque drawn in his own name[4]. But if a person authorise another to sign a note in his name, dated at a particular place, and made payable at a banker's; and the person, in whose name it is drawn, represent it to be the name of another person, with intent to defraud, and no such person as the note and the representation import exists, this is forgery[5]. Signing a bill in an assumed name is a forgery, if the name was assumed to defraud the person to whom such bill is given, though such person would equally have taken the bill had the accused used his real name[6].

Cases.—Document in the name of a fictitious person.—The accused was alleged by the prosecution to have advertised that a work on English idioms by Robert S. Wilson, M.A., was ready, stating that the price was Rs. 2-4 and that intending purchasers might remit it by money order to Robert S. Wilson, Council House Street, Calcutta: to have then requested the postal authorities at Calcutta by a letter signed Robert S. Wilson, to have the money orders redirected to him as above at Rajam: to have similarly requested the Postmaster at Rajam to pay the money orders to his clerk, Seshgiri Rau: to have subsequently received the value of money orders made out in favour of Robert S. Wilson from the Postmaster at Rajam signing receipts as Seshgiri Rau: Robert S. Wilson and Seshgiri Rau were alleged to be fictitious persons, and it was also alleged that the accused had no book on English idioms ready to be despatched to purchasers: it was held that the above allegations supported charges of cheating and forgery[7]. Where certain per

1 Per Muttusami Ayyar and Parker, JJ., in *Pera Raju*, (1889) 13 Mad. 27, 31; *Sheefait Ally*, (1868) 10 W. R. (Cr.) 61, 2 Beng. L. R. (A. Cr. J.) 12.

2 (1765) 1 Leach 57, 59.

3 Pleas of the Crown, Vol. II, p. 961.

4 *Martin*, (1879) 5 Q. B. D. 34.

5 *Parkes & Brown*, (1796) 2 Leach 775, 2 East P. C. 963, 965.

6 *John Frances*, (1811) R. & R. 209; *Robert Peacock*, (1814) R. & R. 278; *Samuel Whiley*, (1805) R. & R. 90; *Thomas Bontien*, (1813) R. & R. 260.

7 *Pera Raju*, (1889) 13 Mad. 27.

d that the per- fore signing the .hey afterwards have intended any person real

Document made to conceal a previous dishonest, or fraudulent, or negligent act.—The Calcutta High Court has laid down that if the intention with which a false document is made is to conceal a fraudulent or dishonest act which has been previously committed, that intention cannot be other than an intention to commit fraud; and if the intention is to commit fraud, the making of a false document with that intention will come within the definition of forgery[2]. It has also held that the making of false entries in a book or register by any person in order to conceal a previous fraudulent or dishonest act falls within the purview of s. 477A inasmuch as the intention is to defraud[3] In a subsequent case, however, the same Court held that the alteration of accounts so as to show the receipt of a sum of money criminally misappropriated and in order to remove evidence of such misappropriation was not an offence either under s 465 or s 477A, there having been no intent to commit fraud The cases of *Lolit Mohan Sarkar* and *Rash Behari Das* were distinguished on the ground that the entry in this case showed that the accused was liable and it was a statement of the true position of affairs, whereas in those cases the accounts were framed in such a way as to conceal liability and to present an untrue state of affairs[4].

The Madras High Court is of the same opinion. It has held that a debtor who forges a release to screen himself from liability to pay the debt is guilty of forgery, because he intended by the forgery to cover a dishonest purpose[5] Where a process-server prepared and filed into Court a false *attakshi* with forged signatures with a view to defraud a District Munsiff into excusing his delay in returning processes and his absence from duty for a period of seven days, it was held that he was guilty of offences under ss 168 and 471[6]

The Bombay High Court has also held, adopting the Calcutta view, that a man who deliberately makes a false document with false signatures in order to shield and conceal an already perpetrated fraud is himself acting with intent to commit fraud. It is a fraud to take deliberate measures in order to prevent persons [illegible] to protect the fraud, he forged with the help of the accused certain *challans* showing that the sums had been paid over to the Government Treasury The accused was paid Rs 25 for the work. He was, on these facts, charged with the offence of forgery. The Sessions Judge acquitted him on the ground that the forgery was committed to conceal the fraud which had already been fully committed, whereas s 463 required that forgery should be "with intent to commit fraud or that fraud may be committed". It was held, setting aside the order of acquittal, that the offence of forgery was complete although it was effected to conceal a fraudulent or dishonest act previously committed[7].

1 *Venkaraju Venkatasami*, (1910) 8 M. L. T. 124, [1910] M. W. N. 232

2 *Lolit Mohan Sarkar*, (1894) 22 Cal 313, 327; *Das*, (1909) U. B. R. (P. C) 29

3 *Rash Behari Das*, (1908) 35 Cal 450, dissenting from *Jiwanand*, (1882) 5 All 221; *Girdhari Lal*, (1886) 8 All 653, and *Abdul Hamid*, (1886) 13 Cal. 249, 351.

4 *Jyotish Chandra Mukerjee*, (1909) 36 Cal. 955.

5 *Sabapati*, (1888) 11 Mad. 411

6 *Kamatchinatha Pillai*, (1919) 42 Mad. 558.

7 *Balkrishna Vaman*, (1913) 37 Bom. 666, 15 Bom. L. R. 708, 2 Bom. Cr. C. 115.

A falsification of a record made in order to conceal a previous act of negligence, not amounting to fraud, does not amount to forgery[1].

The Allahabad High Court has ruled that falsifications of records made in order to conceal previous acts of fraud[2], or negligence[3], do not amount to forgery as no one would be defrauded or injured by them. Following these decisions it has decided that a clerk who, after committing criminal breach of trust, makes false entries in an account book, with the intention of concealing such offence, does not commit forgery[4]. Similarly, where a public servant, in charge as such of certain documents, having been required to produce them, and being unable to do so, fabricated and produced similar documents, with the intention of screening himself from punishment, it was held that such fabricated documents, having not been made with the intent specified in s. 463, were not forgeries[5]. With respect to a charge under s. 465 the accused's immediate and more probable intention, and not his remoter and less probable intention, should be attributed to him. Where the intention is to conceal a fraud which has been previously committed, it is not the kind of intention which that section refers to[6]. Where the accused in order to save himself from the consequences of misappropriations made by him, made false entries in the accounts, it was held that he could not be convicted of forgery[7].

The Rangoon High Court has adopted the view of the Madras High Court. Where a Bench Clerk received a sum of money paid in as fine and misappropriated it, and made a false receipt to cover up such misappropriation, it was held that the offence came under the provisions of ss. 467 and 471[8].

Joint act.—If several persons combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals[9]. Each is a principal, though he does not know by whom the other parts are executed, and though it is finished by one alone, in the absence of others[10]. Thus, the makers of the paper and plate respectively for the purpose of forging a note, afterwards filled up by a third person, are principals in the forgery with that person[11].

Abetment.—A person taking an active part in the preparation of a document, but no part in the forgery of the name of the executant, does not commit forgery, but simply abets the offence[12]. To prepare in conjunction with others a copy of an intended false document, and to buy a stamped paper for the purpose of writing such false document, and to ask for information as to a fact to be inserted in such false document do not constitute forgery, or an attempt to commit it, but would amount to abetment[13].

PRACTICE.

Evidence.—Prove (1) that the accused made, signed, sealed, or executed the document, or any part of it, or made a mark denoting execution.

(2) That he did as in (1) with the intention of causing it to be believed that such document was made, signed, sealed, or executed by, or by the authority of another person; or (2) that it was executed at a particular time.

(3) That such another person did not so execute, or did not authorize such execution, or that such execution was not at that particular time.

(4) That the accused knew that it was not so executed, either by such person, or by the authority of such person, or at that time[14].

1 *Shankar*, (1880) 4 Bom. 657.
2 *Jageshur Pershad*, (1873) 6 N. W. P. 56.
3 *Lal Gumul*, (1870) 2 N. W. P. 14.
4 *Jiwanand*, (1882) 5 All. 221.
5 *Mazhar Husain*, (1883) 5 All. 553.
6 *Girdhari Lal*, (1886) 8 All. 653.
7 *Shiya-ud-din Ahmad*, (1922) 20 A. L. J. 662.
8 *Nga Ba Sein*, (1924) 3 B. L. J. 113.
9 *John Bingley*, (1821) R. & R. 446.
10 *Robert Kirkwood*, (1831) 1 Mood. 304.
11 *Jonathan Dade*, (1831) 1 Mood. 307.
12 *Kashi Nath Naek*, (1897) 25 Cal. 207.
13 *Padala Venkatasami*, (1881) 3 Mad. 4.
14 *Ramgopal Dhur*, (1868) 10 W. R. (Cr.) 7.

(5) That he did as in (1) and (2) dishonestly or fraudulently, or with intent (*a*) to cause damage or injury, or (*b*) to support any claim or title, or (*c*) to cause a person to part with property, or (*d*) to cause any person to enter into any express or implied contract, or (*e*) to commit a fraud, or that a fraud might be committed.

Or prove (1) the making or executing of the document by some one.

(2) That the accused afterwards altered such document by cancellation or otherwise.

(3) That such alteration was in a material part of the document.

(4) That the accused had no lawful authority to make such alteration.

(5) That he did so dishonestly, or fraudulently, or with intent, etc, as in (5) above.

Or prove (1) that the accused caused a person to sign, seal, execute, or alter the document.

(2) That such person when doing as in (1) was ignorant of the contents of the document, or of the nature of the alteration.

(3) That such ignorance was due to (*a*) unsoundness of mind, or (*b*) intoxication, or (*c*) a deception practised upon him

(4) That the accused knew of such ignorance, and the reason thereof.

(5) That he, when causing such person to sign, etc , acted dishonestly or fraudulently, or with intent, etc., as in (5) above

Where it is alleged on behalf of the prosecution that a deed is forged, it is not sufficient for the prosecution to prove that it is improbable that the deed is genuine, but it must prove for a certainty that the deed is forged[1].

Opinion of an expert as to handwriting.—The Court is competent to use its own eyes for the purpose of deciding whether certain handwritings placed before it are similar or not and the opinion of an expert is only a piece of evidence whereas [illegible] the case[2]. The opinion of the expert [illegible] making it the basis of a conviction[3]. [illegible] expert in handwriting is, as a general rule, very unsafe. Where it was sought to convict a clerk, employed in an office, of forgery, upon the supposed similarity between his handwriting and that of some fragmentary pieces of writing upon which the charge was based, it was held that the prosecution should make an attempt to show that the accused was the only man in the office who could have written the forged document[4]. It is dangerous to come to a conclusion on the question of forgery on a mere comparison of the writing in a disputed document with the writings in admitted documents. One of the most useful tests in considering a case of forgery is to see whether a clear dissimilarity of habit can be traced through the documents tendered. If there exists such a dissimilarity, then it is difficult to say that the same person wrote them all. The judicial mind has constantly taken advantage of the characteristic peculiarities of individuals when a question has been raised whether their writings have been forged, such peculiarities being most commonly manifested in the formation of an idea or in the mode of spelling particular words[5]

A convictio [illegible] handwriting[6]. A [illegible] if his only knowle [illegible]

Opinion of an expert in handwriting or thumb impression or palm impression.—Evidence of comparison of hand-writing is often extremely dangerous Of

1 *Rayaji Natha*, (1897) Unrep. Cr. C. 917.
2 *Uohab Santara*, (1921) 23 Cr. L. J. 74.
3 *Girdhari Lal*, (1925) 26 Cr. L J. 929.
4 *Srikant*, (1904) 2 A. L. J. 444. See *Venkata Row*, (1913) 36 Mad 159.
5 *Bhonu Lal* v. *Vincent*, (1922) 3 P. L. T. 653; *Mohammad Kabir Uddin*, (1919) 20 Cr. L. J. 534; *Uohab Santara*, sup
6 *Sagarmal Agarwalla*, (1924) 40 C. L. J. 135.
7 *Rickard*, (1918) 26 Cox 318

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, forged a certain document, to wit——(*describe it*), with intent to cause damage or injury to AB, [*or* to support a certain claim or title, to wit——; *or* to cause AB to part with certain property, to wit——; *or* to enter into a certain contract with AB with regard to (*mention the object*)] or with intent to commit fraud (*state the deposition*); and that you thereby committed an offence punishable under s. 465, and within the cognizance of the Court of Session (*or* High Court.)

And I hereby direct that you be tried by the said Court on the said charge.

466. Whoever forges a document[1], purporting to be a record or proceeding of or in a Court of Justice[2], or a register of birth, baptism, marriage[3] or burial, or a register kept by a public servant as such, or a certificate or document purporting to be made by a public servant[4] in his official capacity, or an authority to institute or defend a suit, or to take any proceedings therein, or to confess judgment, or a power-of-attorney, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Forgery of record of Court or of public register, etc.

COMMENT.

To bring his act under this section or s. 471 the elements of fraud or dishonesty, as explained in the Code, must be present in the mind of the person accused[1].

Scope.—This section "is not intended to apply to cases where a public officer, or a person acting for a public officer, whose duty it is to make entries in a public book, knowingly makes a false entry, but to cases where a certificate or other document is forged by some unauthorized person with a view to make it appear that it was duly issued by a public officer. As, for instance, where a man forges a marriage certificate duly issued by the officer who ought to have issued it"[2]. But the former Chief Court of the Punjab held that whoever, whether a public servant or a private individual, so tampers with a public register, as to commit forgery, is punishable under this section[3]. Intent to defraud is, however, essential[4].

1. **'Document'.**—See s. 29, *supra*.

2. **'Court of Justice'.**—See s. 20, *supra*. If a Judge fabricates any record in a pending case, he commits an offence under this section[5].

3. **'Register of...marriage'.**—This section applies to the forging of a document purporting to be a Register of marriage, although the Register is a private one and not one kept by the public servant as such, e.g., a Register of Marriages of Mahomedans kept by a *Kazi*[6].

4. **'Document purporting to be made by a public servant'.**—A docu-

4 *Hari Chand*, (1903) P. L. R. No. 8 of 1904.

5 *Sitarama Krishna Ayyar* v. *Seshappa Naidu*, (1928) 52 Mad. 347.

6 *Bacha Miah*, (1891) 1 Weir 541. A person who personates another before a Regis- ... of ... is ... sin.

'Public servant'.—See s. 21, *supra*.

Copy.—Where a person who is bound to give a true copy of any document gives a true copy of such document, he cannot be legally convicted of the offence of forgery punishable under this section, merely because the original of which he gives a true copy contains a statement which is false, and is known or believed by him to be such[1].

CASES.

Fraudulent intent must only exist in the mind of the forger.—A person who, at the request of another sent to trap him, fabricates a document purporting to be a notice under the seal and signature of a Deputy Collector, he being informed that the notice was required by such other person for the purpose of being used in a pending suit (there being, however, in reality no such suit in existence) is guilty of forgery, it not being necessary that the intention of fraudulently using the document should exist in the mind of any other person than the person fabricating the document[2].

Alteration in a certificate.—The alteration of name and age in an educational certificate and the use thereof by the person altering to obtain an official appointment, which the officer appointing would have withheld if he had known of the alterations, constitute, in the absence of satisfactory explanation, offences under ss. 476 and 471[3].

Alteration in Government correspondence.—A Government *tumar* (correspondence), in which accused Nos. 2 and 3 were interested, was kept by a Mamlatdar at the house of his clerk. During the absence of the clerk from his house, accused No. 1, another clerk in the Mamlatdar's office, removed the *tumar* without anybody's consent. In the company of accused Nos. 2 and 3 he went with it to a neighbouring town to show it to the pleader of accused Nos. 2 and 3 in connection with some proceeding. Accused No. 1 left the *tumar* with the pleader and went away. Later he brought the *tumar* back and stealthily replaced it from where it was taken. It was afterwards discovered that some papers had disappeared from the *tumar*, whilst others had either been mutilated or altered. It was held that accused No. 1 was guilty of theft as he had removed the *tumar* without the consent of its custodian and accused Nos. 2 and 3 were guilty of abetment of theft; and that accused Nos. 2 and 3 were also guilty of offences under this section and s. 193, in respect of the alteration of the document[4].

Alteration in a register.—Certain goods were consigned to the complainant and on arrival of the goods at their destination the complainant was required by the Station Master to unload the goods within a certain period. After the complainant had unloaded the goods, the accused, a goods clerk, entered the time of the unloading in the register. The Station Master subsequently discovered that in unloading the goods the complainant had blocked the line on which the wagon was standing and called upon the complainant to clear the line. After the line had been cleared the Station Master directed the accused to alter the time of the unloading of the goods from that previously entered in the register to that at which the line had been cleared. It was held that even if the Station Master's view as to the correct time when the goods had been unloaded was erroneous, the accused was not guilty of this offence[5].

[1] *Marigawda*, (1891) Cr. R. No. 42 of 1891, Unrep. Cr. C. 583.
[2] *Haradhan Maiti*, (1887) 14 Cal. 513, F. B.
[3] *Nga Pye*, (1904) 2 L. B. R. 316.
[4] *Vallabhram Ganpatram*, (1925) 27 Bom. L. R. 1391, 8 Bom. Cr. C. 157.
[5] *Gulab Singh*, (1925) 26 Cr. L. J. 1233.

PRACTICE.

Evidence.—Prove (1) that the accused forged the document[1].

(2) That the document forged is one of the kinds specified in this section.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, *on or about the——day of——, at——, forged the document, to wit——*, which purported to be a record (*or* proceeding of a Court of Justice, etc.), and that you thereby committed an offence punishable under s. 466 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Forgery of valuable security, will, etc.

467. Whoever forges a document[1] which purports to be a valuable security[2] or a will[3], or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest or dividends thereon, or to receive or deliver any money, moveable property[4] or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any moveable property or valuable security, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

The offence described in this section is an aggravated form of the offence described in the last.

To support a conviction under this section, the forged document must be one of those mentioned in the text[2]. It must be shown that the document is a false document within the meaning of s. 464, and that it was forged by the accused with some intent mentioned in s 463. It is not sufficient that some possible intent may be inferred from the facts but it is necessary that such intent should be established by evidence[3]. A mere fraudulent preparation of a deed of sale, with intent to cause injury to certain persons, does not amount to forgery of a valuable security unless that document be a false document[4].

1. 'Forges a document'.—See s. 29, *supra*, as to 'document'. The fraudulent alteration of a collectorate *chellaun* is forgery of a document within the meaning of this section[5]. Forgery of a document, even if the person for whom it is forged has no intention of using it, is an offence under this section[6]. Before the writer of a forged receipt can be convicted it must be shown that he was present at the execution of the receipt or that he helped any person to use it[7]. Where C, a witness to a forged will, in addition to his signature had written an attestation clause to the effect that he had put his signature to the will at the instance of the alleged testator, it was held that, having regard to the definition of

1 *Vide* s. 465, supra.

2 (1864) 1 W. R. (Cr L) 9.

3 *Kailas Chandra Das*, (1902) 6 C. W. N. 382, not followed in *Somasundaram Pillai*, (1909) 6 M. L. T. 266, the facts of which are stated under s. 474, *infra*.

4 (1866) 5 W. R. (Cr. L) 5

5 *Hurish Chunder Bose*, (1864) W. R. (Gap. No.) Cr 22.

6 *Surat Bahadur*, (1924) 1 O. W. N. 362.

7 *Mazher Ahmed*, (1925) 24 Cr. L J. 1253.

'document', this attestation was not only a part of the document purporting to record the attested will, but was in itself also a document[1].

2. 'Valuable security'.—See s. 39, *supra*. An unregistered document, though not a valuable security until the registration is completed, still purports to be a valuable security within the meaning of this section[2]. Similarly, two documents with forged signatures, one of which was intended to be filled up as a promissory note and the other as a receipt, but the spaces for particulars of the amount, the name of the person in whose favour the documents were executed, the date and place of execution and the rate of interest were not filled in, were held to be valuable securities[3]. But a *sanad* conferring a title of dignity on a person is not a valuable security[4]. A blank paper, on a bond barred by limitation, is not a document of the kind described in this section[5]. But forgery may be committed of a promissory note on an unstamped paper even though a statute prohibits the stamp to be annexed afterwards[6], of a *hundi*[7], or of a *kabuliyat*[8]. It is no objection to the charge of forgery that the instrument is not available by reason of some collateral objection not appearing upon the face of it[9]. The accused was found in possession of two documents; one was a registered conveyance in respect of certain lands from A to the wife of the accused; the second purported to be a conveyance in respect of the same land from the same vendor to the accused himself, but this was not registered. The accused requested a school-boy to have the registration endorsement from the former copied on to the latter and was thereupon arrested and charged under this section read with s. 116 and under s. 474. At the trial A deposed that he never executed the second conveyance but as regards the first he said that he had executed it in favour of accused's wife but that the accused was in possession of the lands and had also paid him the consideration money. The High Court held that as it was not shown that the second document was made with any of the intents mentioned in s. 463 or that it was intended to be fraudulently or dishonestly used, a conviction under any of the above sections was not maintainable[10]. Accused No. 1 was the creditor of a person for Rs. 38. To pay off his debt, the debtor got out the sum from his father by a postal money order drawn in his name. When the money order arrived at the place, accused No. 1 received the money direct from the postman and had the acknowledgment signed by accused No. 2 under the representation that accused No. 2 was the payee. Neither accused informed the debtor of the money order or the receipt of the money. It was held that the accused were guilty of forging a valuable security, e.g., the money order acknowledgment, an offence punishable under this section[11].

Material alteration of an incomplete document.—An agreement in writing, which purported to be entered into between five persons, was signed by only two of them; it was altered by the addition of some material terms by the accused who was one of the two executants without the consent or knowledge of the other executant and was not signed by the other parties to the agreement. The accused was in possession of the instrument which was altered by him. It was held that the accused was guilty of the offence of forgery of a valuable security under s. 467, or of being in possession of a forged document under s. 474[12].

3. 'Will'.—See s. 31, *supra*.

1 *Chatru Malik*, (1928) 10 Lah. 265.
2 *Kashi Nath Naek*, (1897) 25 Cal. 207; *Ramasami*, (1888) 12 Mad. 148; *Govind Ramappa*, (1889) Unrep. Cr. C. 467.
3 *Jawahir Thakur*, (1916) 38 All. 430.
4 *Jan Mahomed*, (1884) 10 Cal. 584.
5 *Raghoonundun Puttronuvees*, (1871) 15 W. R. (Cr.) 19.
6 *Morton*, (1795) 2 East P. C. 955.
7 *Lekhraj*, (1910) P. W. R. No. 55 of 1910.
8 *Ismail Panju*, (1925) 26 Cr. L. J. 1115.
9 *M'Intosh*, (1800) 2 East P. C. 956.
10 *Kailas Chandra Das*, (1901) 6 C. W. N. 382.
11 *Jogidas Babu*, (1921) 24 Bom. L. R. 99, 6 Bom. Cr. C. 169.
12 *Ramaswami Ayyar*, (1917) 41 Mad. 589.

4. ***'Moveable property'.***—See s. 22, *supra*. The forging of a docment which purports on the face of it to be a copy only, and which, even if a genuine copy, would not authorize the delivery of moveable property, is not punishable under this section[1].

PRACTICE.

Evidence.—Prove (1) that the accused committed forgery[2].

(2) That the document forged is one of the kinds mentioned in this section.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

But when the valuable security is a promissory note—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session

Complaint.—The word 'forgery' is used as a general term in s 463, and that section is referred to in a comprehensive sense in s. 195 of the Criminal Procedure Code so as to embrace all the species of forgery afterwards provided for as to punishment and this includes a case falling under this section[3]

Punishment.—Where the forged documents are alternative drafts of any document they do not call for separate punishment[4].

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, forged a certain document purporting to be a valuable security, to wit——, [*or* a will made by——, *or* an authority to adopt given by——to, *or* an authority, given to——to make or transfer a certain valuable security, to wit——] with intent——; and that you thereby committed an offence punishable under s. 467 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court)

And I hereby direct that you be tried by the said Court on the said charge. The charge must set out the intention of the accused[5].

Forgery for purpose of cheating.

468. Whoever commits forgery, intending that the document[1] forged shall be used for the purpose of cheating[2], shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

Forgery, though a substantive offence, partakes of the nature of an attempt. It is usually an act done in furtherance of some other criminal design. If it can be proved that the purpose of the offender in committing the forgery is to obtain ... pose comes within the definition of ... it section. The intention of the forger ... he contents of the forged documents[6].

If the cheating is complete, and the subsequent forgery is for the purpose of concealing that offence, this section does not apply[7].

To establish fraudulent intention under this section it is not essential to prove pecuniary advantage[8].

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[1] *Naro Gopal*, (1866) 3 B. H. C. (Cr. C.) 56.

[2] *Vide* s. 465, sup.

[3] *Tulja*, (1887) 12 Bom. 36, 41; *Teni Shah v. Bolaki Shah*, (1909) 14 C. W. N. 479.

[4] *Surat Bahadur*, (1924) 1 O. W. N. 362.

[5] *Haidar Ali*, (1912) 17 C. W. N. 354.

[6] M. & M. 418; *Jagan Nath*, (1926) 9 L.L.J. 103. In this case the accused had forged a letter of recommendation purporting to have been written by the Governor of the Punjab.

[7] *Hurmukh Rai*, (1876) P. R. No. 15 of 1876.

[8] *Madhavlal Chaganlal*, Crim. Appln. for Rev. No. 195 of 1920, decided on September 9, 1920, per Shah and Crump, JJ. (Unrep. Bom.)

1. **'Document'.**—See s. 29, *supra*. A hammer for marking sleepers is a document within the meaning of this section[1].

2. **'Cheating'.**—See s. 415, *supra*.

CASES.

Falsification of account-books with a view to deception.—Where a person's object was to deceive his employer by falsifying account-books which were in his custody, such deception being likely to cause deception to his employer, it was held that he had committed forgery with intent to cheat under this section, and not an offence under s. 465[2].

Making of a false register.—Forgery of a school attendance register, for the purpose of obtaining a Government grant, is punishable under this section[3]. The entry of an excess payment in a muster roll will not make the muster roll a forged document[4].

Making a false attakshi.—Where a process-server prepared and filed into Court a false *attakshi* with forged signatures with a view to defraud a District Munsiff into excusing his delay in returning processes and his absence from duty for a period of seven days, it was held that he was guilty of offences under this section and s. 471[5].

Preparation of a false bill.—The accused, a Talati, prepared a full week's bill for distribution of doles in his village, while staying out of the village, on the basis of the bill for the foregoing week, in utter ignorance of what had happened in the village and in order to avoid the trouble of going to their village personally. The bill was sent to the Circle Inspector, who, on comparing it with the original register kept at the village, found that no doles had been distributed for four out of the seven days of the week. It was held that the accused was not guilty of an offence under this section as he had no criminal intention to commit fraud which was requisite to complete the offence of forgery under this section[6].

PRACTICE.

Evidence.—Prove (1) that the document is a forgery.

(2) That the accused forged the document[7].

(3) That he did as above intending that the forged document would be used for the purpose of cheating[8].

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Complaint.—Complaint in writing of the Court, before which the offence is committed or of some other Court to which such Court is subordinate, is necessary[9]. An offence under s. 463 mentioned in clause (c) of s. 195, Criminal Procedure Code, covers an offence under this section, the object of mentioning s. 463 in s. 195, Criminal Procedure Code, being to include all cases of forgery whatever the nature of the fraudulent intention may be[10].

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1 *Joseph*, (1924) 3 Ran. 11.
2 *Banessur Biswas*, (1872) 18 W. R. (Cr.) 46.
3 *Kuppana Pillai*, (1885) Weir (3rd Edn.) 336.
4 *Ram Ghulam Singh*, [1929] A. L. J. 592.
5 *Kamatchinatha Pillai*, (1918) 42 Mad. 558.
6 *Madhavlal Chaganlal*, Crim. Appln. for Rev. No. 195 of 1920, per Shah and Crump, JJ., decided on September 9, 1920 (Unrep. Bom.)
7 *Vide* s. 465, *supra*.
8 *Vide* s. 417, *supra*.
9 Crim. Pro. Code, s. 195 (1) (c).
10 *Ramammal*, (1911) 36 Mad. 387.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, forged a certain document, ... at you ... Code, ... (or High Court)]

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Forgery for purpose of harming reputation.

469. Whoever commits forgery intending that the document[1] forged shall harm the reputation[2] of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENT.

... g the reputation ... ith the intention ... have this effect, writes a letter in imitation of B's handwriting purporting to be addressed to a confederate in some disgraceful or dishonest transaction and shows this letter to other persons, he commits this offence.

1. **'Document'.**—See s. 39, *supra*.

2. **'Harm the reputation'.**—See s. 499, *infra*. A person, who forged a draft petition, with the intention of using it as evidence and which contained false statements calculated to injure the reputation of another person, was held guilty of this offence[1].

PRACTICE.

Evidence.—Prove (1) that the document in question is a forgery[2].

(2) That the accused forged it.

(3) That he did so intending that the document forged would harm the reputation of some one, or knew that it was likely to be used for that purpose.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Forged document.

470. A false document made wholly or in part by forgery is designated "a forged document".

Using as genuine a forged document.

471. Whoever fraudulently or dishonestly uses as genuine any document[1] which he knows or has reason to believe to be a forged document[2], shall be punished in the same manner as if he had forged such document.

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1 *Sheefait Ally*, (1868) 10 W. R. (Cr.) 61, 2 Beng. L. R. (A. Cr. J.) 12.

2 *Vide* 465, *sup.*

was held that this was not an involuntary production of a document in Court and that the accused was guilty of an offence under this section[1]. A person tendering, during the course of a Police investigation, a forged document to the investigating officer, and thereby causing that officer to do something which he would otherwise not have done, is guilty of having used a forged document within the meaning of this section[2]. Where in order to support a false claim, a forged document is so mentioned in another document that it can be easily identified, it constitutes the offence of using a forged document within the meaning of this section[3]. The production of a forged title deed in answer to a citation in which no particular deed is specified and giving evidence in regard to it amounts to user within the meaning of this section[4]. Where two persons were jointly tried in a case and the pleader of the first accused filed a forged document in the case under the instruction of the second accused for the common benefit of both and both of them took advantage of the document, it was held that there was a user of the document by the second accused also within the meaning of this section[5].

'Document'.—A hammer for marking sleepers is a document within the meaning of this section[6].

Conditional uttering.—A conditional uttering of a forged instrument is as much a crime as any other uttering. Where a person gave a forged acceptance to the manager of a banking company where he kept an account, saying that he hoped this bill would satisfy the bank as a security for the debt he owed, and the manager replied that that would depend on the result of inquiries respecting the acceptors, it was held that this was a sufficient uttering[7].

2. 'Knows or has reason to believe to be a forged document'.—The person using the document must have specific knowledge that the document is a forgery. The words 'knows or has reason to believe to be a forged document' are of general application. The mere fact that a pleader's suspicions ought to have been aroused by the sight of a forged document is not prima facie evidence that he knew, or had reason to believe, the document to be forged. A pleader is under no higher obligation than any other agent would be, and to justify his prosecution it should be shown that he had been a party to the concoction of the document, or that he had the knowledge that it was concocted[8].

The accused purchased one-ninth share of 437 *kanals* 12 *morlas* land, this one-ninth share being set out in the deed as amounting to 48 *kanals* 12 *morlas.* Eleven years after, the deed was presented to the Putwari by the accused with a request that he should enter up mutation "according to the terms set out in the deed", the deed being previously tampered with so as to make the one-ninth share appear to be a two-ninths share, but the other recitals and figures in the deed remained untouched. It was not established that the accused had himself made the alteration. The Putwari entered up mutation of 97 *kanals* 4 *morlas*, that is, two-ninths share. On the mutation coming before the Tahsildar for sanction, the alteration in the deed came to light. It was held that though the accused had used the deed as a genuine document, it was not shown that he had so used it fraudulently or dishonestly knowing or having reason to believe it to be a forged document; and that the alteration made in the deed did not, in the face of the figures given therein, make it a sale of anything more than 48 *kanals* 12 *morlas*[9].

1 *Ishar Das*, (1924) 6 Lah. 50.
2 *Sajanlal Biswas*, (1920) 3 U. P. L. R. (P.) 42, 22 Cr. L. J. 274.
3 *Sithava Naik*, (1915) 16 Cr. L. J. 703.
4 *Digambar Chakravarti* v. *Ram Taran Mitter*, (1917) 18 Cr. L. J. 839.
5 *Baju Jha*, (1928) 9 P. L. T. 800.
6 *Joseph*, (1924) 3 Ran. 11.
7 *Cooke*, (1838) 8 C. & P. 582.
8 *Ranchhoddas Nagardas*, (1896) 22 Bom. 317.
9 *Karim Dad*, (1913) P. R. No. 25 of 1913.

'Reason to believe'.—See s. 26, *supra*.

Copy.—A person may be convicted of using as genuine a document which he knows to be forged, though, he in the first instance produced only a copy of

a claim, the use of such certified copies is a use of forged documents when they are put in the case. The mere circumstance that the documents had been forged would not be sufficient to justify a conviction. It is necessary to prove that the use has been fraudulent or dishonest and in addition that the person putting in the copies knew, or had reason to believe, that the originals were forged[3]

The Calcutta High Court has held that it is doubtful whether the mere filing of a copy is the user of a forged document But it is otherwise where the offender used the copy knowing or having reason to believe that the entries in the original documents were forgeries and intending to use them for fraudulent purposes. A certified copy of a forge [illegible] The making of a copy of a forgery does [illegible] of the copy was authorized to make the [illegible] e copies of revenue records in support of his complaint of trespass and he knowingly produced forged copies as genuine. It was held that this was not an involuntary production of a document in Court and that he was, therefore, guilty of an offence under this section[6].

CASES.

Alteration in a document without a fraudulent intent.—The creditors of a Police Constable applied to the District Superintendent of Police that Rs. 2 might be deducted monthly from the debtor's pay until the debt was satisfied. Upon an order being passed, directing that the deduction asked for should be made, the debtor produced a receipt purporting to be a receipt for Rs 18, the whole amount due. It subsequently appeared that the receipt was one for Rs 8, which

sarily follow that he contemplated setting up the altered receipt to defeat his creditors' claim; and that, therefore, he ought not to have been convicted under this section[7].

The accused made a change in a document so that it may be taken in evidence The document related to certain transactions which the Settlement Officer could not take into consideration but would not have been bound by what it stated. In fact the accused's case was ruined. It was held that the accused acted improperly but not dishonestly and could not be convicted of an offence under this section[8].

Certificate.—The accused applied to the Superintendent of Police at Poona for employment in the Police force In support of his application he presented two certificates which he knew to be false. One of these certificates was a wholly fabricated document, whilst the other was altered by several additions made

[5] *Lachman Lal*, (1918) 4 P. L. J. 16.
[6] *Ishar Das*, (1924) 6 Lah 50.
[7] *Syed Husain*, (1885) 7 All. 403.
[8] *Kali Din*, (1919) 17 A. L. J 872.

it was held that the accused was not
, being a valuable security, but was

Attakshi.—Where a process-server made an *attakshi* with false signatures in order to defraud a District Munsiff into excusing his delay in returning processes and his absence from duty, it was held that he was guilty under s. 468 and this section[2].

Prescription.—Where the accused obtained a prescription from a medical man for one tube of morphia and altering the words "one tube" to "four tubes" presented the prescription to a chemist and obtained four tubes of morphia from him, he was held to have committed this offence[3].

Uttering.—English cases.—If A exhibits a forged receipt to B, a person with whom he is claiming credit for it, this is an uttering[4]. Delivering a box containing, among other things, forged stamps to the party's own servant that he might carry them to an inn to be forwarded by a carrier to a customer in the country, was an uttering[5]. But showing a man an instrument the uttering of which would be criminal, though with an intent of raising a false idea in him of the party's substance, was not uttering[6]. Where the accused placed a forged receipt for poor rates in the hands of the prosecutor for the purpose of inspection only, in order, by representing himself as a person who had paid his rates, fraudulently to induce the prosecutor to advance money to a third person, it was held that this was an uttering[7] The accused, being the Secretary of an enrolled benefit society of which his wife was a member, and having received a sum of money belonging to the members with directions to pay it into a certain savings bank, uttered what purported to be a bank pass-book containing a false entry of the receipt of the money, knowing it to be forged, in order to induce the members of the Society to believe that he had paid the money into the bank when he had

between the spelling of the payee's name in the bill and the endorsement, upon

If an engraving of a forged note be given to a party as a pattern or specimen of skill, the party giving it not intending that the particular note should be put in circulation, it is not uttering[11].

PRACTICE.

Evidence.—Prove (1) that the document was a forged one[12].

(2) That the accused used such document.

(3) That he used it as a genuine one[13].

a lease

[9] *John Birkett*, (18[illegible]) [illegible]
[10] *Arscott*, (1834) 6 C. & P. [illegible]
[11] *Harris*, (1836) 7 C. & P. [illegible]
[12] *Vide* s. 465, [illegible]
[13] *Jaha Bux*, (18[illegible]) [illegible] (Cr.) [illegible]; *Srinivasa Paiyar*, [illegible]
[14] *Bholay* [illegible] (Cr.) 32.

it was held that it was not necessary to prove that he personally inserted the word, but it was sufficient if it was inserted with his knowledge[1].

In a case for uttering forged bills, the guilty knowledge of the accused was proved by producing other forged bills on the same house in the possession of the accused[2]. If the possession of other forged instruments is offered in evidence to prove a guilty knowledge, there must be regular evidence that such instruments were forged[3]. Evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment is not admissible unless upon the issue whether the acts charged against the accused were designed or accidental, or unless to rebut a defence otherwise open to him[4]. See also ill. (c) to s. 159 of the Indian Evidence Act.

(5) That he used it dishonestly or fraudulently[5].

In deciding whether there has been a 'using as genuine' of the document, the Court will advert to the nature of the document. Some documents, such as receipts, are intended to remain in the holder's possession, other documents, such as cheques or promissory notes, must be tendered to the persons who are to pay them. Whatever the document, the dealing with it by the accused person must be such as to satisfy the Court that he intended to defraud, but it is not necessary that wrongful gain or wrongful loss should actually be caused by the use[6].

On an indictment for uttering a forged will, which, together with writings in support of it, it was suggested, had been written over pencil marks which had been rubbed out, it was held that the evidence of an engraver, who had examined the paper with a mirror and traced the pencil marks, was admissible on the part of the prosecution[7].

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by the same Court as that by which the forgery is triable.

When the forged document is a promissory note of the Government of India—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Complaint.—Complaint in writing of the Court before which the offence is committed, or some other Court to which such Court is subordinate is necessary[8]. No such complaint is required for the prosecution of a person in respect of a forged document when he is not a party to the proceeding in which the forged document is produced[12], or where subsequent to the complaint a suit was instituted in a Court on the document in section[10].

Sections 467 and 471.—Where owing to some reason (e.g., absence of jurisdiction) the accused cannot be charged under s. 467, he can be charged and convicted under s. 471[11].

Sections 471 and 474.—Convictions under this section and s. 474 cannot stand together[12].

Sections 471 and 196.—The using of a forged document is punishable under this section and not under s. 196[13]. The accused used as true or genuine evidence a receipt acknowledging the receipt of a certain sum in cash by the complainant

1 *Hemoruddi Mundul,* (1868) 9 W. R. (Cr.) 22.

2 *George Hough,* (1806) R. & R. 120. See *Edward Ball,* (1807) R. & R. 132; *Colclough,* (1882) 15 Cox 92.

3 *Samuel Millard,* (1813) R. & R. 245.

4 *Makin* v. *Att. Gen. for New South Wales,* (1894] A. C. 57.

5 *Kishen Pershad,* (1870) 2 N. W. P. 202.

6 M. & M. 419.

7 *Thomas Williams,* (1838) 8 C. & P. 434.

8 Criminal Procedure Code, s. 195 (1) (c); *Kanhaiya Lal* v. *Bhagwan Das,* (1925) 48 All. 60.

9 *Kondeti Obalesu,* (1914) 26 M. L. J. 220.

10 *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Biswambhar Brahmin,* (1929) 56 Cal. 1041.

11 *Bhagvatty Perumal Pillay,* (1912) 13 Cr. L. J. 862.

12 *Nuzur Ali,* (1873) 6 N. W. P. 39.

13 *Kherode Chunder Mozumdar,* (1880) 5 Cal. 717.

which he knew to be forged. He was charged and tried under s 196. It was held that the accused should have been charged under s. 471 and not under s. 196[1].

Sections 471 and 167.—The offence of a public servant framing an incorrect document with intent to cause injury under s. 167 is included in the offence of forging a document and using it as genuine under ss. 467/471 and a conviction both under the provisions of s. 167 and ss. 467/471 is not maintainable[2]

Sections 471 and 467.—Where the accused was charged under s. 467, but it appeared in evidence that he had committed an offence under s 471 for which he might have been charged under s. 236 of the Criminal Procedure Code, it was held that although he was not charged with it, he could be convicted of an offence under s. 471[3].

Separate charges.—The accused was charged with using as genuine eleven forged receipts which were put in by him in sets on three separate occasions, each set with a written statement in three suits pending against him A charge was framed against him in respect of the using of each set of receipts, and he was tried [illegible] ...nded ... nents ... that ... been ... iat as the 'using' charged was the putting in of each set of documents with the respective written statements in three suits, and as there was nothing to show that any of the documents had been used at any other time, there was only one using in respect of each set of documents and that there was, therefore, no valid ground for questioning the conviction[4].

Punishment.—The offence of uttering forged documents requires to be punished with the severest punishment allowed by law[4]. If a document is used fraudulently and dishonestly and if it purports to be a valuable security, the punishment provided by s. 467 and not that provided by s 465 will be that to which the accused will be liable under this section[6].

Charge.—This section does not specify the punishment, but declares that using a forged document shall be punished like forgery, and a charge for using a forged document should make mention of it coupled with one or other of ss. 465, 466, or 467, according to the nature of the document forged[7] The definition of forgery should not be entered in the charge simply describing the offence as [illegible].

[illegible]

[illegible] ...y charge you (*name of accused*) as follows:—

That you, on or about the ——day of——, at——, fraudulently (*or* dis- [illegible]

[1] *Hara Mohun Das*, (1926) 44 C. L. J. 113.

[2] *Gulzari Lal*, (1926) 3 O. W. N. 760.

[3] [illegible] (1919) 21 Cr. L. J. 410: (Cr.) 13

[5] *Sagarmal Agarwalla*, (1924) 40 C. L. J. 135

[7] (1864) 1 W. R. (Cr. L.) 10; (1865) 3 W. R. (Cr L.) 8; *Gangaram Malji*, (1869) 6 B. H. C. (Cr. C.) 43; *Tikaram Lohar*, (1893) 8 C. P. L. R. (Cr.) 1.

[8] (1867) 8 W. R. (Cr. L.) 7.

472. Whoever makes or counterfeits[1] any seal, plate or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under section 467 of this Code, or, with such intent, has in his possession[2] any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Making or possessing counterfeit seal, etc., with intent to commit forgery punishable under section 467.

COMMENT.

The making or possession of instruments such as plates for engraving bank notes, for forging valuable securites, etc., where the purpose for which such instruments are intended to be used is known, is the offence here punished. In the Chapter of offences relating to Coin and Government Stamps, there are similar provisions. This section and the section following are akin to ss. 235, 255 and 256.

1. **'Counterfeits'.**—See s. 28, *supra.*

2. **'Possession'.**—See s. 27, *supra.*

PRACTICE.

Evidence.—Prove (1) that the accused made or counterfeited the seal, plate, etc., or that he had such seal, etc., in his possession, and that he knew it to be counterfeit.

(2) That such seal, etc., was made in order to produce impressions.

(3) That he intended to use such seal, etc., for the purpose of committing forgery.

(4) That such forgery was punishable under s. 467.

Counterfeit seals and forged documents were found in the accused's possession; and as he could give no satisfactory information as to how he became possessed of them, it was inferred that he kept them with the intention of using them fraudulently[1].

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the—— day of——, at——, made (*or* counterfeited) a seal, (*or* plate, *or* instrument) for making an impression, intending that the same shall be used for the purpose of committing any forgery punishable under s. 467 of the Indian Penal Code, [*or* had in your possession the seal (*or* plate, *or* instrument) intending that the same shall be used for the purpose of committing any forgery] and that you thereby committed an offence punishable under s. 472 of the Indian Penal Code and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

473. Whoever makes or counterfeits any seal, plate, or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under any section of this Chapter other than section 467, or, with such intent,

Making or possessing counterfeit seal, etc., with intent to commit forgery punishable otherwise.

1 *Kisto Soonder Deb,* (1865) 2 W. R. (Cr.) 5.

has in his possession any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

If the forgery is not of such a serious nature as is punishable under s. 467, then it will be punishable under this section.

Where counterfeit seals and forged documents are found in the accused's possession, and he can give no satisfactory information as to how he became possessed of them, it can be inferred that he is keeping them with the intention of using them fraudulently[1].

Where the accused was in possession of a counterfeit stamp for making an impression by letters or marks on trees in order to indicate that the trees had been passed for removal by the Ranger of a forest, it was held that he was guilty of an offence under this section[2].

PRACTICE.

Evidence.—Prove points (1) to (3) as those for s. 472, and further—

(4) That such forgery was punishable under any section of this Chapter.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Separate offences.—Where several seals of different descriptions were found in the possession of the accused with intent to commit forgery, it was held that there was a complete and separate offence committed in respect of every seal found, and that the accused could be legally convicted of a separate offence in regard to each seal, unless it appeared that several such seals were in their possession for the purpose of committing one particular forgery[3].

Charge.—See s. 472, *supra*.

Having possession of document described in section 466 or 467, knowing it to be forged and intending to use it as genuine.

474. Whoever has in his possession[1] any document[2], knowing the same to be forged, and intending that the same shall fraudulently[3] or dishonestly[4] be used as genuine, shall, if the document is one of the description mentioned in section 466 of this Code, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and, if the document is one of the description mentioned in section 467, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

[1] Persons who have in their possession forged documents of any description knowing that they are forged, are guilty of this offence if they intend that the document shall be used for a fraudulent or dishonest purpose. It does not signify whether such fraudulent use will be by themselves or by other person to whom they may dispose of the documents for the purpose of such fraudulent use. It

[1] *Kisto Soonder Deb*, (1865) 2 W. R. (Cr) 5.
[2] *Krishtappa Khandappa*, (1925) 27 Bom. L. R. 599, 8 Bom Cr C. 41.
[3] *Goluck Chunder*, (1870) 13 W. R. (Cr) 1.

may be reasonably inferred that a person in whose possession several forged documents are found has an intention to use them fraudulently, unless he can give satisfactory information as to how he became possessed of them and as to the purpose for which he retains them in his possession[1].

A person cannot be convicted under this section when the document fabricated by him does not fall within the description given in s. 466 or 467. Nor can he be convicted of forgery when he does not make it with any of the intents mentioned in s. 463. In the absence of a complaint by the Court the offence of attempting to fabricate evidence cannot be proceeded with when the offence is committed in relation to a proceeding in Court[2].

This section resembles ss. 212, 213 and 259.

1. **'Possession'.**—See s. 27, *supra*. Where a person took a forged document into a Court in connection with a case, but did not actually use it, although he intended to do so, if necessary, he was held guilty of an offence under this section[3]. A document alleged to have been executed by one M was found in the possession of the accused. It was found that M did not execute the document and that it was executed in the presence of the accused for their benefit. It was contended by the accused that as the property comprised in the document belonged to them by virtue of certain other documents executed in the name of *benami* for them, the document was not dishonest or fraudulent. It was held that as it was executed and registered to confirm their alleged title and to enable them to deal with the property to the detriment of persons dealing with them in regard to that property, the document was fraudulent and a forgery[4].

2. **'Document'.**—See s. 49, *supra*.

3. **'Fraudulently'.**—See s. 45, *supra*.

4. **'Dishonestly'.**—See s. 44, *supra*.

PRACTICE.

Evidence.—Prove (1) that the document was a forged one[5].

(2) That the accused had it in his possession.

(3) That he knew it to be forged when he had it in his possession.

(4) That he intended that it should be used as a genuine document.

(5) That he intended as above dishonestly or fraudulently.

Prove also whether the forged document is one of the description mentioned in s. 466 or 467[6].

It is not sufficient for a conviction to say that the accused might possibly have used an altered document; the guilty intent must be proved, not inferred[7]. But where forged documents are found in the possession of the accused and he could not give satisfactory information as to how he became possessed of them it was inferred that he kept them with the intention of using them[8].

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

1 M. & M. 421; *Kisto Soonder Deb*, (1865) 2 W. R. (Cr.) 5.

2 *Radha Kishan*, (1925) 7 L. L. J. 118, 26 P. L. R. 95.

3 *Hatim Moonshee*, (1867) 8 W. R. (Cr.) 11.

4 *Somasundaram Pillai*, (1909) 6 M.L.T. 266.

5 *Vide* s. 465, sup.

6 *Abaji Ramchandra*, (1891) 16 Bom. 165.

7 *Lokenath Shaha*, (1864) W. R. (Gap. No.) (Cr.) 12.

8 *Kisto Soonder Deb*, sup.

475. Whoever counterfeits[1] upon, or in the substance of, any material, any device or mark used for the purpose of authenticating any document[2] described in section 467 of this Code, intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who, with such intent, has in his possession[3] any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Counterfeiting device or mark used for authenticating documents described in section 467, or possessing counterfeit marked material

COMMENT.

The commencement of the forgery of bank notes and other similar securities where it has proceeded to the length which is described in this section, is treated as a substantive offence and punished Also the possession of the prepared material, etc., is punished

This section supplements the provisions of s 472[1].

The document must be of a nature mentioned in s. 467[2].

1. **'Counterfeits'.**—See s 28, *supra*
2. **'Document'.**—See s. 29, *supra*
3. **'Possession'.**—See s 27, *supra.*

PRACTICE

Evidence.—Prove (1) that the accused counterfeited upon or in the substance of any material, a device or mark.

(2) That such device or mark is used for the purpose of authenticating any document described in s 467

(3) That the accused intended to use such device or mark for the purpose of giving the appearance of authenticity to some document

(4) That such document was forged or was thereafter to be forged.

Or prove—

(1) That the accused was in possession of the papers referred to in the charge;

(2) that the device or mark was counterfeited on them;

(3) that the marks were such as are used for the purpose of authenticating any document described in s 497, and

(4) that the accused intended that the marks should be used for the purpose of giving the appearance of authenticity to documents, either then forged or thereafter to be forged[3].

As to the admissibility in evidence of other forged documents, see *Abaji Ramchandra*[4] and *Parbhudas Ambaram*[5].

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

[1] M. & M 421.
[2] *Rughoonundun Puttronuvees*, (1871) 15 W. R. (Cr.) 19.
[3] *Abaji Ramchandra*, (1891) 16 Bom. 165; *Rughoonundun Puttronuves*, sup
[4] (1890) 15 Bom. 189.
[5] (1874) 11 B. H. C. 90.

Complaint.—Complaint in writing of the Court before which the offence is committed, or some other Court to which such Court is subordinate is necessary[1].

Charge.—In the trial of an accused person on a charge under this section, the charge should be so framed as to specify distinctly that part of the section which is applicable to the case, and should distinctly specify the particular papers bearing a counterfeit mark or device which the accused was alleged to have had in his possession with the intent mentioned in the section[2].

The charge should run thus:—

I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, counterfeited upon (*or* in the substance of) any material, to wit——, a device (*or* mark), to wit——, used for the purpose of authenticating any document, [*or* that you were in possession of any material, to wit——, upon] (*or* in the substance of) which device (*or* mark) was used for the purpose of authenticating a document, intending that such device (*or* mark) shall be used for the purpose of giving the appearance of authenticity to some document then forged (*or* to be forged on such material), and that you thereby committed an offence punishable under s. 475 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Counterfeiting device or mark used for authenticating documents other than those described in section 467, or possessing counterfeit marked material.

476. Whoever counterfeits[1] upon, or in the substance of, any material, any device or mark used for the purpose of authenticating any document[2] other than the documents described in section 467 of this Code, intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who, with such intent, has in his possession[3] any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

This section is similar to the last section, but as the document, the counterfeit of which is made punishable, is not of so much importance as in the last, the punishment is not so severe.

1. **'Counterfeits'.**—See s. 28, *supra*.
2. **'Document'.**—See s. 29, *supra*.
3. **'Possession'.**—See s. 27, *supra*.

PRACTICE.

Evidence.—Prove the same points as those for s. 475, showing in (2) that such device or mark is used for the purpose of authenticating any document other tahn the document described in s. 467.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

1 See Criminal Procedure Code, s. 195 (1) (c).

2 *Abaji Ramchandra*, (1891) 16 Bom. 165.

Complaint.—Complaint in writing of the Court before which the offence is committed, or some other Court to which such Court is subordinate, is necessary[1].

Fraudulent cancellation, destruction, etc., of will, authority to adopt, or valuable security

477. Whoever[1] fraudulently or dishonestly,[2] or with intent to cause damage or injury[3] to the public[4] or to any person,[5] cancels, destroys or defaces, or attempts to cancel, destroy or deface, or secretes or attempts to secrete any document[6] which is or purports to be[7] a will[8], or an authority to adopt a son, or any valuable security[9], or commits mischief[10] in respect to such document, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

This section applies when the document tampered with or destroyed is either a will, or an authority to adopt, or a valuable security Owing to the great importance of documents of this kind the punishment provided is severe

1. 'Fraudulently'.—See s 25, *supra.*

2. 'Dishonestly'.—See s 44, *supra.*

3. 'Injury'.—See s. 24, *supra* Where the accused was convicted under this section for destroying a *patta* but the prosecution failed to prove that the act was done with intent to cause damage or injury, it was held that the act might have been a very foolish act but the conviction under this section could not be maintained[2]

4. 'Public'.—See s 12, *supra.*

5. 'Person'.—See s 11, *supra*

6. 'Document'.—See s 29, *supra.*

7. 'Purports to be'.—These words make the law of India upon this matter what it has in a long succession of cases been held to be in England, namely, that the absence of a stamp is insufficient to deprive the document of its character of a valuable security in the view of penal law[3].

8. 'Will'.—See s 31, *supra* Where a will is fraudulently concealed, the grant of letters of administration which operates as a judgment in rem and presupposes the non-existence of the will, is no bar to a prosecution for this offence[4].

9. 'Valuable security'.—See s 30, *supra.*

Tearing up of a lease[5], a promissory note[6], or a rough account showing a liability on the part of the accused[7] amounts to the destruction of a valuable
not be
tearing
e document is invalid for want of consideration[8].

10. 'Mischief'.—See s 425, *supra.*

[1] Criminal Procedure Code, s 195 (1) (c).
[2] *Ram Harakh Pathak*, (1925) 23 A L J. 990.
[3] (1873) 7 M H C. App 26
[4] *Mali Mathu Seray*, (1926) 27 Cr. L. J. 1230.
[5] *Nittar Mundle*, (1865) 3 W. R (Cr) 38.
[6] *Madurai*, (1888) 12 Mad. 54.
[7] *Ramasami*, (1888) 12 Mad. 148, 154
[8] *Kotha Goundan*, (1890) 1 Weir 554

Object.—This section was introduced by Act III of 1895, s. 4. It is intended to meet a glaring defect in the law which was proved to exist in *Shama Churn Sen's* case[1], in which a man was charged with defrauding a bank to the extent of three lakhs of rupees. He was acquitted because it could not be shown that the three lakhs had been abstracted upon any one particular ...

"That if any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant, shall wilfully and with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or shall wilfully and with intent to defraud make or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, or any document, or account, then in every such case the person so offending shall be guilty of a misdemeanour, and be liable to be kept in penal servitude for a term not exceeding seven years, or to be imprisoned with or without hard labour for any term not exceeding two years".

Scope.—The marginal note to this section indicates that the section only applies when there is falsification of accounts. The explanation to the section imports the same idea, namely, that the section refers to something in the way of book-keeping or written accounts. This point is raised but not decided in *Emp. v. Bibudhananda Chakravarti*[3], where it is held that the removal of new Court fee stamps from documents and substitution in their places of used stamps, with alterations of figures on them, do not fall within the scope of this section.

Ingredients.—The section requires the following essentials:-

1. The person coming within its purview must be a clerk, officer, or servant, or acting in the capacity of a clerk, officer or servant.

2. He must wilfully and with intent to defraud—

(i) destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which

(a) belongs to, or is in the possession of, his employer, or

(b) has been received by him for or on behalf of his employer; or

(ii) make or abet the making of any false entry in, or omit or alter or abet the omission or alteration of any material particular from or in, any such book, paper, writing, valuable security, or account.

1. 'Clerk, officer or servant employed or acting in the capacity of a clerk, etc.'—See ss. 381 and 408, *supra*. Where a partner in a firm is appointed as such to manage the business of the firm or to write its account, he acts as its servant and if he falsifies accounts he is liable to be punished under this section[4].

The words 'acting in the capacity of a clerk or servant' include a person who undertakes to perform or does perform the duties of a clerk or servant whether in fact he is a clerk or servant or not, and though he is under no obligation to perform such duties and receives no remuneration[5].

Payment by percentage of gross takings is no bar to the relation of master and servant[6].

[1] Calcutta case. Unreported.
[2] 28 & 29 Vic., c. 24.
[3] (1919) 47 Cal. 71, 74.
[4] *Lalloo Giridhar*, 1 ... Bom. L. R. ...; *Mahomed v. Mahomed Hafiz*, (1924), 26 Cr. L. J. 1252.
[5] *Emperor* ...
[6] ...

2. 'Wilfully and with intent to defraud, destroys, alters, muti or falsifies any book, paper, etc.'—'Wilfully' means that the act is done berately and intentionally, not by accident or inadvertence, but so that the of persons who does the act goes with it[1].

'Intent to defraud'.—See s. 463, *supra*. Even if the intention with the false entries are made is to conceal a fraudulent or dishonest act pr v committed, the intention will be to defraud[2]. The issuing of a false sta report of a company calculated to deceive the public and intended to induce to invest their money in the company which they would not otherwise have in is an act done with intent to defraud[3].

'Falsifies'.—The expression 'falsify' applies to the preparation of an new document containing false information. To 'falsify' means to 'render and a new document containing false information is correctly described a document and the act of preparing such a document is called the falsificat the document[4].

'Valuable security'.—See s. 30, *supra*.

'Account'.—The offence is complete when accounts are falsified with to defraud[5]. An alteration of the accounts made after embezzlement will within the section, if it is a part of the scheme to deprive another of his m But the alteration of accounts so as to show the receipt of a sum of money im misappropriated and in order to remove evidence of such misappropriation an offence under this section, there being no intent to commit fraud. The ac were the Post Master and Treasurer of a Post Office. The Post Master des to a person four sacks of waste-paper forms of the Post Office kept in his c and appropriated the proceeds of the sale which amounted to Rs. 10. The fac discovered and an enquiry was set on foot. The Post Master, to cover his to credit the proceeds of the sale, with the help of the Treasurer, changed t counts. The Post Master was charged and convicted under ss. 409, 465, 471 ar section and the Treasurer under ss. 465, 471 and this section. It was held, on a that the conviction of the Post Master under ss. 465 and this section was wrong was no intent to commit fraud. The cases of *Lolit Mohan Sarkar*[7] and *Behari Das*[8] were distinguished on the ground that in this case the entry s that the Post Master was liable and that it was a statement of the true p of affairs, whereas in the two above-mentioned cases the accounts were f in such a way as to conceal liability and to present an untrue state of affair

The word 'account' includes any contrivance for registering words or fi The figures on an automatic taximeter may be an account. An offence und section is committed if a servant wilfully and with intent to defraud tamper a mechanical instrument used by his employer for registering figures from an account is subsequently prepared. There are now in use a number of mech means for counting money and calculating sums received or paid, and it would serious thing to say that to falsify the mechanical means whereby an acco brought into existence is not to falsify an account. A company were the o of certain motor-cabs and had in their service a number of cab-drivers. Eac was fitted with a taximeter, that is, a mechanical instrument which, when in a registers upon a dial the amount earned by the driver from persons hiring th The taximeter was put into and out of action by the driver depressing and

1 *Senior*, [1899] 1 Q. B. 283, 290; *Ryan*, (1914) 24 Cox 135, 137.

2 *Rash Behari Das*, (1908) 35 Cal. 450.

3 *Ram Chand Gurwala*, (1926) 27 Cr. L. J. 1383.

4 *Ibid*, p. 1385.

5 *Swaminathan Chettiar* v. *Annamalai Chettiar*, (1908) 4 M. L. T. 481; *Narain Rudra Dat*, (1925) 47 All. (1901) 1 Weir

6 *Annasami Aiyangar*, sup.

7 (1894) 22 Cal. 313.

8 (1908) 35 Cal. 450.

9 *Jyotish Chandra Mukerjee*, (1909) 955.

a lever respectively. From the figures appearing on the dial at the end of the day an account was prepared stating the proportions due to the company and to the driver for the use of the cab. For several successive days a driver in the company's service took certain passengers on a definite round, receiving from them on each day the same fare. While taking the passengers on this round, the driver wilfully and with intent to defraud drove the cab with the lever of the taximeter raised, so that the instrument was put out of action and registered nothing. It was held that the driver was guilty of falsifying an account[1].

'Belongs to or is in the possession of his employer'.—The account which an accused person renders false must belong to, or be in the possession of, his employer[2].

'Abets' —See s. 107, *supra.*

'Omission'.—See s. 33, *supra.*

CASES.

Alteration in a cash book.—The accused, a Forest clerk, made alterations in the cash book and the office register of his office, so as to make it appear from the books that certain moneys due in respect of "compounding fees" were in fact paid into the Government treasury, when they had been embezzled by the Forest Guard whose duty it was to collect them It was held that the accused was guilty under this section inasmuch as the false entries were made with a view to conceal the embezzlement, and thereby to deprive the Government of their money[3].

False entries in a register.—Certain sums of money were received at a Munsifi for payment into Government treasury but they were never paid The accused, an accountant in the Munsiff's Court, did not enter these sums in the Chelan Register. But after the commencement of an enquiry into the matter, he, for the purpose of concealing the non-payment, made false entries in the Register showing that these sums had been paid to the credit of the Collector It was held that inasmuch as the accused, in making the false entries, was in reality furthering the fraud which had been committed upon the Government, he acted fraudulently and was guilty under this section[4] Where a postal clerk was alleged to have retained money, the proceeds of a V. P P. sale, for three months, and made a false entry in his register of V. P Ps to the effect that the parcel had been refused by the addressee and returned to the vendor, and then after he had been transferred to another station, to have remitted the money to the vendor, it was held that an offence under this section had been committed[5]. The accused, a Sub-Postmaster, received a V. P. letter to be delivered to a person on payment of the V.P. amount He handed over the letter to that person without getting payment on or before October 20, 1925, and then altered his accounts so as to make it appear that he only handed over the letter on October 24, 1925. It was held that the accused was guilty of falsification of accounts[6]

The accused made unauthorised entries in a book shewing certain donees of land as proprietors of their holding merely without any share in the *shamilat*, whereas previously they were shown as full proprietors. The deeds of gift made no mention of the *shamilat* and it was therefore a moot point whether the gifts covered a share in the *shamilat* or not and *prima facie* the new entries made by the accused were correct. It was held that it could not be said that accused (who acted bona fide) fraudulently altered any book or register within the meaning of this

1 *Solomons*, [1909] 2 K. B. 980.
2 *Palin*, [1906] 1 K. B 7.
3 *Annasami Aiyangar*, (1901) 1 Weir 554.
4 *Rash Behari Das*, (1908) 35 Cal. 450.
5 *Das*, (1909) 1 U. B. R. (P. C.) 29.
6 *Kandasami Aiyar*, (1926) 52 M. L. J. 703, 38 M. L. T. 318, 25 L W. 656.

section[1]. The accused, the managing director of a bank, wishing the bank to make a better show than the real facts of its working would warrant, in order to maintain the confidence of the shareholders and the public and so to make possible a project for increasing largely the bank's capital, on December 17, 1912, got his son to present a pro-note for Rs. 3,000 as a *pro tanto* addition to the profits for 1912 by reducing on paper to that extent his remuneration account from Rs. 4,050, which he had actually drawn to Rs. 1,050, and thus deceiving the shareholders as to the real profits, induced them to declare a dividend of 6 per cent. instead of some 3 per cent. which would otherwise have been the most possible. Later, in January 1913, i.e., after the close of the financial year, the whole thing was readjusted and matters returned to the *status quo ante* December, 17, 1912. It was held that the accused was guilty of an offence under this section inasmuch as he falsified the balance-sheet of 1912 and the books of the bank by showing as profits Rs. 3,000 which were not profits and that he falsified them none the less because he first manufactured a pro-note in order to give the falsified balance-sheet and books an appearance of correctness[2].

English cases.—B, a collector in the employment of N, collected on February 22 from S £8 14*s.* 10*d.*, due to N. The ordinary course of business was for B, at the end of each day, to account to E, N's cash clerk, for moneys collected during the day, E's duty being to enter payments accounted for by B in the cash-book. On the evening of February 22, B gave E a slip of paper on which he had written, "Shepard, on account, £5", which E copied into the cash-book, believing that it represented the whole amount collected by B from Shepard. It was held that B was rightly convicted under s. 1 of the Falsification of Accounts Act[3]. The accused was employed by a firm carrying on business in London, to manage their branch in Paris. It was his daily duty to enter on slips an account of all sums received by him in Paris for his employers, and to transmit those slips to them in London in order that the amounts may be entered up in a cash-book kept in London. On a certain day the accused received three sums in Paris which he fraudulently appropriated to his own use and omitted to enter the receipt thereof on the slips sent by him on that day to London, knowing and intending that the same would in consequence be omitted from the cash-book, as was the case. It was held that the accused was guilty under s. 1 of the Falsification of Accounts Act[4].

PRACTICE.

Evidence.—Prove (1) that the accused destroyed, altered, mutilated, or falsified the book, paper, writing, valuable security, or account in question.

(2) That the accused was a clerk, officer, or servant, or acted in any such capacity.

(3) That the book, paper, etc., belonged to, or was in the possession of, his employer, or had been received by him for or on behalf of his employer.

(4) That the accused did as in (1) wilfully and with intent to defraud.

Or prove (1) that the accused made or abetted the making of any false entry in or omitted or altered or abetted the omission or alteration of some material particular from or in such book, paper, etc.

(2), (3) and (4) as above.

It is necessary to show not merely false entries in the books of accounts, but that such false entries were made with intent to defraud[5]. It is not necessary to prove that any person or persons was or were actually deceived; it is quite sufficient if it is proved that the false statutory report by a company had that tendency[6].

[1] *Muhammad Sirdar*, (1914) P. R. No. 25 of 1914.
[2] *Daulat Rai*, (1915) P. R. No. 28 of 1915.
[3] *Butt*, (1884) 15 Cox 564.
[4] *Oliphant*, [1905] 2 K. B. 67.
[5] *Drewett*, (1904) 21 T. L. R. 164.
[6] *Ram Chand Gurwala*, (1926) 27 Cr. L. J. 1383.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class.

Charge.—Each act of falsification of a distinct document amounts to a separate offence; and an accused person can only be charged with and tried at one trial in respect of any number of such falsifications not exceeding three committed

charge[3]

The charge should run thus:—

I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, being a clerk (*or* officer, etc.), to AB, wilfully, and with intent to defraud, destroyed (*or* altered, mutilated, etc.), a certain book (*or* paper, writing, etc.), to wit——, which belonged to (*or* which was in the possession of) the said AB, your employer, and thereby committed an offence punishable under s. 477A of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Of Trade, Property and Other Marks.

Sections 478 to 489 were substituted for the original sections by the Indian Merchandise Marks Act (IV of 1889), s. 3

Object.—"Ordinarily the infringement of a trade-mark is rather a civil than a criminal wrong, but as civil proceedings may require much time and expenditure to bring them to a conclusion, the legislature, in its anxiety to protect traders, has allowed of resort to the criminal Courts to provide a speedy remedy in cases where the aggrieved party is diligent and does not by his conduct show that the case is not one of urgency. If, therefore, the person aggrieved fails to resort to criminal Courts within a year of the offence coming to his knowledge, the law assumes that the case is not one of urgency, and it leaves him to his civil remedy by an action for injunction"[4].

A person aggrieved by the infringement of his trade mark has two remedies open to him: (1) he can institute criminal proceedings under the Code, or (2) he can bring an action for an injunction and damages; and, although the criminal Court has a discretion in view of the peculiar circumstances of a particular case, e.g., if there exists a bona fide dispute as to the right to use a trade mark, or where there has been undue delay in commencing criminal proceedings, to stay its own hands and direct the complainant to establish his rights in a civil Court, it is nowhere laid down by the Legislature that an aggrieved person should seek his remedy in a civil Court and not in a criminal Court[5].

Abetment.—"If any person, being within British India, abets the commission, without British India, of any act which, if committed in British India, would... under any section of that part of Chapter XVIII of the Indian Penal Code which relates to trade, property and other marks, be an offence, he may be tried for such abetment in any place in British India in which he may be found, and be punished therefor with the punishment to which he would be liable if he had himself committed in that place the act which he abetted"[6].

[1] *Fitzmaurice*, (1926) 27 Cr. L. J. 793, *Manant K. Mehta*, (1925) 49 Bom. 892, 27 Bom. L. R. 1373, 8 Bom. Cr. C. 109.

[2] *Mati Lal Lahiri*, (1899) 26 Cal. 560; *Raman Behari Das*, (1913) 41 Cal. 723; *Kalka Prasad*, (1915) 38 All. 42.

[3] *Mangal Sen*, (1929) 30 Cr. L. J. 958, [1930] Cr. C. (Lah.) 25.

[4] Per Boddam, J., in *Ruppell* v. *Ponnusami Tevan*, (1899) 22 Mad. 488, 490.

[5] *Banarsi Das*, (1928) 9 Lah

[6] Merchandise Marks Act (), s.

478. A mark[1] used for denoting that goods are the manufacture or merchandise of a particular person is called a trade mark,

Trade mark.

and for the purposes of this Code the expression "trade mark" includes any trade mark which is registered in the register of trade marks kept under the Patents, Designs and Trade Marks Act, 1883*, and any trade mark which, either with or without registration, is protected by law in any British possession or foreign State to which the provisions of the one hundred and third section of the Patents, Designs and Trade Marks Act, 1883, are, under Order in Council, for the time being applicable.

COMMENT.

A trade-mark is some symbol, consisting in general of a picture, label, word, or words, which is applied or attached to a trader's goods, so as to distinguish them from similar goods of other traders, and to identify them as his goods, or as those of his successors in the business in which they are produced or put forward for sale.

A mark to be a trade-mark must be a mark used for denoting that the goods are the manufacture or the merchandise of a particular person[1]. A trade mark must be some visible and concrete device or design affixed to goods to indicate that they are the manufacture of the person whose property the trade mark is[2]. "The right which a manufacturer has in his trade mark is the exclusive right to use it for the purpose of indicating where, or by whom, or at what manufactory, the article to which it is affixed was manufactured"[3]. A mark which has been used by the complainant in the market for six years can become his trade mark[4]. "A man may mark his own manufacture, either by his name, or by using for the purpose any symbol or emblem, however unmeaning in itself, and if such symbol or emblem comes by use to be recognized in trade as the mark of the goods of a particular person, no other trader has a right to stamp it upon his goods of a similar description"[5]. "A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot therefore be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe, that the goods which he is selling are the manufacture of another person"[6]. It is immaterial whether the deception arises from the use of a name which is, as it happens, the name of the defendant, or whether it arises from the use of any other description which in a sense may be accurate of that which he sells. For, if the article which he sells is come to be known in the market as meaning something made by somebody other than himself it is impossible for him to sell it *simpliciter* by that name, although it be his own, without misleading purchasers[7].

Where a manufacturer has no exclusive right to manufacture a certain article or even articles of a particular brand, all that he can claim is that no other manu-

*Sections 62 to 81 and, so far as they respectively relate to trade-marks, ss. 85 to 99, 101, 102, 105, 108, 111 to 117 of this Act are repealed by the Trade-Marks Act of 1905.

1 *Anookool Chunder Nundy*, (1900) 27 Cal. 776.

2 *Anath Nath Dey*, (1912) 40 Cal. 281.

3 Per Lord Cranworth, in *Leather Cloth Co.* v. *American Leather Cloth Co.*, (1865) 11 H. L. C. 523, 533, 534.

4 *Lakhan Chandra Basak*, (1924) 25 Cr. L. J. 1098.

5 Per Lord Kingsdown, in *Leather Cloth Co.* v. *American Leather Cloth Co.*, (1865) 11 H. L. C. 523, 538.

6 Per Lord Langdale, in *Perry* v. *Truefitt*, (1842) 6 Beav. 66, 73.

7 *Valentine Meat Juice Co.* v *Valentine Extract Co., Ltd.*, (1900) 83 L. T. 259. See *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.*, [1907] A. C. 430; *Eno* v. *Dunn*, (1890) 15 App. Cas. 252.

facturer should so mark such articles as to pass them off as the former's when they are not[1].

In India there is no system of registration of trade-marks, nor is there any provision for a statutory title to a trade-mark so that the rights of parties setting up rival claims to the ownership of a trade-mark is determined in accordance with the principles of the English common law[2]. A trade-mark may be acquired by adoption and user upon a vendible article. Property in or right in respect of a mark may be acquired by user[3]. If a photographer applied a trade-mark to photographs which he sells, the provisions of this section are as applicable to such trade-mark as they are to trade-marks on other goods and vendible articles[4]. A person may to some extent appropriate to his own use a name suggested by his trade, without infringing the law relating to trade-marks or trade descriptions[5].

1. **'Mark'.**—The section deals with trade-marks and not with cases analogous to those of trade-marks. The Bombay High Court has held that the general resemblance or get up, irrespective of the circumstance that the registered trade-mark is different, does amount to counterfeiting a trade mark[6] Similarly, the Calcutta High Court has laid down that the expression 'trade-mark' must not be confined to the trade-mark of the complaining party registered in England, but must include the whole design and label[7]. The former Chief Court of Lower Burma was of a contrary opinion[8].

"Property in a trade-mark is . the right to the exclusive use of some mark, name, or symbol in connexion with a particular manufacture, or vendible commodity, consequently, the use of the same mark in connexion with a different article is not an infringement of such right of property. If, therefore, the trade-mark includes in itself a clear and distinct description of the commodity to which it is affixed, it is not pirated by the use of a mark which, although in other respects similar, does not contain or give the same description, and which is impressed upon an article which is not of the nature or quality so described"[9] "There can be no right to the exclusive ownership of any symbol or mark universally in the abstract Thus, an iron-founder who uses a particular mark for his manufactures in iron could not restrain the use of the same mark when impressed upon cotton or woollen goods: for the property in a trade-mark consists in the exclusive right to the use of that mark as applied to some particular manufacture" or vendible commodity[10].

In India registration is not necessary in order to complete title to a trade mark, and there is no warrant for the broad proposition that a letter or a combination of letters cannot constitute a trade mark[11]. But it is doubtful whether a bottle itself could be considered a trade-mark[12]

A design or pattern, which covers the whole body of the goods and appears to be part and parcel of the goods, is not a trade mark, or trade description[13].

2. **'Merchandise'.**—Merchandise is not synonymous with goods and in connection with trade-marks clearly conveys the idea of goods offered for sale by some person or persons concerned in or connected with the origin or history of the

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4 *Kher* v. *Ahuja*, (1907) 13 Burma L R. 236.

5 *Bakullah Mallik*, (1904) 31 Cal 411.

6 *Ganpat Sitaram Mukadam*, (1914) 16 Bom. L R 78, 2 Bom. Cr. C. 177, *Pakir Mahomed*, [1929] Cr C (Ran.) 498

7 *Nilmoney Nag* v. *Durga Pada*, (1915) 19 C. W. N. 957.

8 *Petley & Son* v. *Stephen Ah Kyun*, (1903) 2 L. B. R 159, *Stephen Ah Kyun* v. *James Petley*, (1903) 10 Burma L. R. 84.

9 Per Lord Chancellor Westbury in *Leather Cloth Co.* v. *American Leather Cloth Co*, (1863) 33 L. J Ch. 199, 201; on appeal, (1865) 11 H L. C. 523.

10 Per Lord Westbury, in *Hall* v. *Barrows*, (1863) 33 L. J. Ch. 204, 207-8.

11 *Banarsi Das*, (1928) 9 Lah. 431.

12 *E S Olpadwalla* v. *James Wright*, (1928) 32 C. W N 1115.

14 *Narumal Khemchand* v. *The* ? *Ltd.*, (1914) 8 S L. R. 32.

goods, of whose guarantee as to the *reliability of the goods* the trade-marks are a symbol. Merchandise implies goods not only offered for sale but also selected and so to say guaranteed by the proprietor of the trade-mark[1].

Importer of goods may have his own mark.—A distinctive mark may be adopted by a person who is not the manufacturer but the importer of goods, and he will acquire property in that mark as indicating all goods which bear it have been imported by him. Where the complainants, importers of hand-made sugar, used a distinctive mark denoting that the sugar contained in the bags so marked had been imported by them, (their customers accepting the mark as a guarantee that the sugar was hand-made), and the accused were found as having used the same mark whereby the complainants had established a special trade, it was held that the accused were guilty of using a false trade-mark[2]. A merchant importing goods is entitled to the same protection of his trade mark as the manufacturer, and the selector-importer who affixes his name or other trade mark to the goods is a person whose merchandise they are. Such goods, if bought by a *person for selling* them again, do not become his merchandise in the same sense. The name of an importer duly appended to the goods can be a *valid* trade-mark; so also a number having nothing to do with the cloth except as an *indication* of its *manufacturer* or importer[3]. Where in the course of a user extending over a large number of years, goods were sold by a firm bearing a certain mark which had been known to purchasers by that mark, it was held that a prosecution would lie at the instance of the firm[4].

Property mark.

479. A mark used for denoting that moveable property belongs to a particular person is called a property mark.

COMMENT.

The distinction between 'trade-mark' and 'property-mark' is not recognized in English law.

Using a false trade mark.

480. Whoever marks any goods or any case, package or other receptacle containing goods, or uses any case, package or other receptacle with any mark thereon[1], in a manner reasonably calculated to cause it to be believed that the goods so marked, or any goods contained in any such receptacle so marked, are the manufacture or merchandise of a person whose manufacure or merchandise they are not[2], is said to use a false trade mark.

COMMENT.

This section says what constitutes the user of a false trade-mark.

Ingredients.—This section has two essentials—

1. Marking any goods or any case[5], package, or receptacle, containing goods; or using any case, package, or receptacle, with any mark thereon.

2. Such marking or using must be in a manner reasonably calculated to cause it to be believed that the goods so marked, or the goods in the marked receptacle, are the manufacture or merchandise of a person whose manufacture or merchandise they are not.

1 *J. M. Dunbar* v. *The Holland Bombay Trading Co.*, (1918) 12 S. L. R. 129.
2 *Latif*, (1916) 39 All. 123.
3 *J. M. Dunbar* v. *The Holland Bombay Trading Co.*, sup.
4 *Pakir Mahomed*, [1929] Cr. C. (Ran.) 498.
5 *Manawala Chetty*, (1906) 5 Cr. L. J. 94.

1. 'Whoever marks any goods or any case, package or other re- ... nufacturer have from ... , the adoption by a ... same name in the market may be as much a violation of the rights of that rival as an actual copy of his device. In such cases dissimilarity of the rival marks is not a complete defence[1]. The word 'goods' includes books[2]. On a complaint alleging that the accused printed and sold an unauthorized edition of a book with the contents, outer cover and title page being exactly the same as in the authorized edition, it was held that in order to bring the case under this section the question would be whether the accused had marked the book he was selling in a manner reasonably calculated to cause it to be believed that it was the manufacture or merchandise of, or that it belonged to, a person whose manufacture or merchandise it was not, or to whom it did not belong[3].

2. 'In a manner reasonably calculated to cause it to be believed, etc.'—The test of the infringement of a trade-mark is whether the acts alleged as an infringement are likely to mislead the public into dealing with the alleged infringer under the belief that they are dealing with a person who first used the mark[4]. How is this to be tested? Lord Herschell says "The eye must be the judge in ... ermined by placing the ... , or whether the one is an ... etail do not prevent the ... -mark, ... r that ... being ... refully and intelligently examined and studied it might not be misled"[7] Thus, it is by ...

... a trade-mark so resembling that of a rival, as that ordinary purchasers, purchasing with ordinary caution, are likely to be misled Actual physical resemblance of the two marks is not the sole question for consideration[8] The proper test is ... ive a purchaser who ... sts to his memory. ... goods without the ... o have regard to the class of purchasers by whom the goods would normally be bought[9].

If the mark complained of is found likely to deceive customers, it is not necessary to bring evidence of any person who is actually deceived[10].

3 *Raghavalu Naidu v. Sundramurthi Mudali*, ibid

... v. *Wright & Butler etc. Ltd*, [1896] 1 Ch. 142, 147.

7 Per Lord Selborne in *Singer Manufacturing Co. v Loog*, (1882) 8 App. Cas. 15, 18.

8 *Saxo v Provezende*, (1866) L. R. 1 Ch. ...

was one which might be fitly decided in a civil Court: *Rasoolkhan Saheb*, [1912] M. W. N. 85. See *Ganpat Sitaram Mukadam*, (1914) 16 Bom. L. R. 78, 2 Bom. Cr. C. 177.

9 *A. M. Malumiar & Company v. Finley Fleming & Company*, (1929) 7 Ran. 169.

10 *Lakhan Chandra Basak* (19..) .. Cr. L. J. 1098.

trade-mark as defined in the Penal Code and such band was merely a part of the 'get-up' of the boxes[1].

Gold bars.—The mere fact that a bank imported and sold gold bars with a particular mark impressed upon them, a mark which was not originally theirs, but belonged to a bank that had ceased to exist, and where there was no proof of any transfer or assignment of the mark, or that the new bank succeeded the other in the sense either that it was a continuation of that bank under another name, or that it succeeded to the business or acquired the good-will of that bank, was held not to be sufficient to establish that the mark was the trade-mark of the new bank[2].

General name cannot be the subject of a trade-mark.—The appellants, who sold fish-hooks in boxes similar to those of the respondents with a

the public had chosen a name for its own use such as 'mash marka" (fish mark), that fact could not be held to prevent other persons from applying a mark to fish-hooks, which might be generally known by the same term[3].

Use of the same receptacle.—A sold illuminant kerosine oil of his own refining in tins originally issued with oil of the same description by B and bearing B's trade-mark The tins had been altered in minor particulars, and paper labels indicating the true manufacturer of the oil had been fixed The bodies of the tins, however, on which B's trade-mark appeared remained unaltered It was held that A had committed this offence[4] According to an agreement between oil companies it was settled that one company could use the tins of another company, provided the company so using the tins put on the cap a distinctive mark showing that the oil was not the manufacture of the company whose tins were being used. In pursuance of this agreement the Burma Oil Company could use the tins of the Standard Oil Company (U S) by putting on the cap the word "Victoria". The accused sold eight tins of kerosine oil, but only two of the tins had the word "Victoria" on the tin caps and the other six had plain tin caps At the time of selling he had told the purchaser that the tins contained oil of the Burma Oil Company and the price agreed upon was the price of the Burma Oil Company as prevailing in the market. It was held that although the accused was guilty of using a false trade-mark so far as the six tins with plain caps were concerned, yet in the absence of a conspiracy between the purchaser and the accused, the accused could not be convicted of using a false trade-mark, as he had acted without intent to defraud[5].

Using a false property mark

481. Whoever marks any moveable property or goods or any case, package or other receptacle containing moveable property or goods, or uses any case, package or other receptacle having any mark thereon, in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or any property or goods contained in any such receptacle so marked, belong to a person to whom they do not belong, is said to use a false property mark.

Stephen Ah Kyun v *James Pelley*, (1903) 10 Burma L. R. 84.

[2] *Anookool Chunder Nundy*, (1900) 27 Cal. 776 See *Dahyabhai Chakasha*, (1904) 6

'A person whose manufacture or merchandise they are not'.—It is good law as well as common sense that no man has a right to put off his goods for sale as the goods of a rival trader, and with that object to use names, marks, letters or other indications by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person's. Still less is he entitled to use marks containing a falsehood on their face for the purpose of deceiving purchasers and palming off upon them an article other than that which they believed they were contracting to buy.

CASES.

Calendars.—The complainant, a descendant of Shri Chandu, used to prepare calendars bearing the name of "Shri Chandu Panchang" at Jodhpur and sent each year the copy of such calendar to the publishers in different parts of India allowing them to use the name of "Shri Chandu Panchang" to denote calendars prepared in Jodhpur by the descendants of Chandu. These calendars had acquired the reputation that they were prepared by those descendants and under their authority. The defendant, a publisher in Bombay, published a calendar and used the words "Shri Chandu Panchang" on the cover, although it was not prepared by the descendants of Chandu. The complainant, thereupon, proceeded against the defendant under this section. It was held that the defendant's act could not come under this section, for the title "Shri Chandu Panchang" could not fall within the definition of 'trade-mark' under s. 478[1].

Labels.—The complainants, the Holland Bombay Trading Co., used to import white shirtings bearing the mark "H. B. T. C. 40,000," a label with a design of a lion and snake and an oval stamp containing written in it the words "Sole Importers, Holland Bombay Trading Company, Limited", and a buff heading. The accused had in their possession for purposes of sale some packages of white shirtings bearing the mark H. P. F. C. 40,000, a label with two lions and two snakes and an oval stamp containing written in it the words "Sole Importers, Holland Export Company", and a buff heading. The letters H. B. T. C. in the complainant's, and H. P. F. C. in the accused's marks were printed in similar types and were similar in size and colour. The colour and size of the labels, also the colour, size and type of the oval stamps in both were similar. It was held (where it was proved that the complainants had a property in their marks) that the accused had used a false trade-mark and were liable to conviction under ss. 482 and 486[2]. The complainant had for many years carried on business as a vendor of ground coffee. He sold this in cylindrical tin boxes, each containing one pound of coffee. On the outside of the cylindrical portion of each box he had affixed a paper label on which was printed, *inter alia*, a picture of a railway engine and carriage. Over the lid and round each box vertically he had pasted an orange-coloured paper band, and on this, in the portion crossing the lid, a facsimile of his signature was printed. The accused sold coffee in similar tin boxes, bearing a similar band, though of a shade of pink, and a label on which was printed a picture of a steamer, the pink band purporting to be a facsimile of the accused's signature in the same position as that in which the complainant's facsimile signature appeared on his boxes. It was held that on the complainant's boxes the chief trade-mark was the picture of a railway train; that he might have a trade-mark in his facsimile signature, but the trade-mark could not reasonably be held to be infringed by the use of a signature of another person of a very different name; and that consequently a prosecution based on the use of what purported to be a facsimile of the accused's name could not succeed. It was held, further, that the band round the boxes vertically did not constitute a

1 *Radha Krishna* v. *Kissonlal Shridhar*, (1901) 26 Bom. 289, 3 Bom. L. R. 883.

2 *Holland Bombay Trading Co.* v. *Buktear Mull*, (1903) 8 C. W. N. 421.

trade-mark as defined in the Penal Code and such band was merely a part of the 'get-up' of the boxes[1].

Gold bars.—The me: [illegible] a particular mark impressed but belonged to a bank that [illegible] any transfer or assignment of the mark, or that the new bank succeeded the other in the sense either that it was a continuation of that bank under another name, or that it succeeded to the business or acquired the good-will of that bank, was held not to be sufficient to establish that the mark was the trade-mark of the new bank[2].

General name cannot be the subject of a trade-mark.—The appellants, who sold fish-hooks in boxes similar to those of the respondents with a design of one fish with its head and tail turned up, were held not to have infringed the trade-marks of the respondents, who also sold fish-hooks with the design of two fish crossed, with their heads and tails turned up. It was held further that where the public had chosen a name for its own use such as "mash marka" (fish mark), that fact could not be held to prevent other persons from applying a mark to fish-hooks, which might be generally known by the same term[3].

Use of the same receptacle.—A sold illuminant kerosine oil of his own refining in tins originally issued with oil of the same description by B and bearing B's trade-mark The tins had been altered in minor particulars, and paper labels indicating the true manufacturer of the oil had been fixed The bodies of the tins, however, on which B's trade-mark appeared remained unaltered It was held that A had committed this offence[4]. According to an agreement between oil companies it was settled that one company could use the tins of another company, provided the company so using the tins put on the cap a distinctive mark showing that the oil was not the manufacture of the company whose tins were being used. In pursuance of this agreement the Burma Oil Company could use the tins of the Standard Oil Company (U S) by putting on the cap the word "Victoria". The accused sold eight tins of kerosine oil, but only two of the tins had the word "Victoria" on the tin caps and the other six had plain tin caps At the time of selling he had told the purchaser that the tins contained oil of the Burma Oil Com- [illegible] Oil Company as pre- [illegible] was guilty of using a [illegible] concerned, yet in the absence of a conspiracy between the purchaser and the accused, the accused could not be convicted of using a false trade-mark, as he had acted without intent to defraud[5].

Using a false property mark.

481. Whoever marks any moveable property or goods or any case, package or other receptacle containing moveable property or goods, or uses any case, package or other receptacle having any mark thereon, in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or any property or goods contained in any such receptacle so marked, belong to a person to whom they do not belong, is said to use a false property mark.

Stephen Ah Kyun v. *James Petley*, (1903) 10 Burma L. R. 84.

[2] *Anookool Chunder Nundy*, (1900) 27 Cal. 776 See *Dahyabhai Chakasha*, (1904) 6 Bom. L R. 513

[3] *Bakaullah Mallik*, (1904) 31 Cal. 411

[4] *Po Saing*, (1907) 4 L. B R. 192.

[5] *Abdul Rashid*, (1918) 16 A L J 476.

COMMENT.

This section defines the offence of using a false property-mark.

A property mark is intended to denote ownership over all moveable property belonging to a person whether it is all of one kind or of different kinds. So long as the person owns moveable properties his property-marks impressed upon them remains his, though any particular article out of it may after such impression pass out of his hands and cease to be his[1].

The function of a property-mark to denote certain ownership is not destroyed because any particular property on which it was impressed has ceased to be of that ownership[2].

Ingredients.—This section requires two essentials:—

1. Marking any moveable property or goods or any case, package or receptacle containing goods; or using any case, package or receptacle, with any mark thereon.

2. Such marking or using must be in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or the property or goods contained in such receptacle belonged to a person to whom they did not belong

1. 'Marking any moveable property or goods, etc.'—"The term 'moveable property'...was intended by the Legislature to include a class or category of properties falling under one ownership, not merely the parts of it which may pass from the hands of the owner into other hands. The class is stable, though the units are ambulatory. The class may be likened to a chain with a multitude of links some of which from time to time drop off but there are others left or those extinct are replenished by fresh links to keep the chain going. So long as the chain remains, the moveable property represented by it is there, though its component parts fluctuate. The term 'moveable property'...was intended to include collective class nouns, i.e., nouns that express a number of objects of the same class collected together"[3].

2. 'In a manner reasonably calculated to cause, etc.'—See Comment on s. 480, p. 1125.

Trade-mark and Property-mark.—The term 'property-mark' is one unknown to English law, and the description of its wrongful use as given in s. 481 would, in most cases, if not in every possible case, be within the scope of English law, viewing the wrong either as a crime or a civil injury. The distinction in the Penal Code between a 'trade-mark' and a 'property-mark' is, that the former denotes the manufacture or qualtity of the goods to which it is attached, and the latter denotes the ownership of them; or more briefly, the former concerns the goods themselves, the latter the proprietor of them. From s. 481 it may be gathered that the result of this distinction is to secure greater precision of definition, rather than to extend the law of trade-marks as known to English lawyers. Thus, if A is known not to be the maker or manufacturer of the goods he sells, but only to have selected and put them up and he uses a certain mark to indicate to his customers that they will thus have the benefit of his skill in selection, then, in the terminology of the Penal Code, the mark would be a property and not a trade-mark: but if the main purpose of the mark were to indicate the quality of the goods, then even though A was not the maker of them, it would be a trade-mark and not a property mark. On the other hand, a mark may be applied to a natural product as distinguished from a manufactured one and though such mark would then probably be called in Indian law a property-mark, it would be equally protected by English law as a trade-mark.

1 *Dahyabhai Chakasha*, (1904) 6 Bom. L. R. 513.

2 *Ibid.*

3 Per Chandavarkar, J., in *ibid*, p. 515.

The words "The National Bank of India" impressed on gold bars imported by the Bank were held to constitute their "trade mark" and not their "property-

482. Whoever[1] uses any false trade mark or any false property mark shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Punishment for using a false trade mark or property mark.

COMMENT.

The use of false trade-mark (with 'intent to defraud') constitutes the offence under this section. If the maker of an article puts on it the trade-mark of another maker and he does this with the intention that purchasers may be induced to believe that the article was made by such other maker, he commits this offence It will be no defence to show that the article is in every respect equal or even superior to similar articles made by the other maker, if the offender intended to practise deception and used the mark for this purpose Where the trade-marks are so different that no one would be misled, no offence is committed.

1. **'Whoever'.**—This word means the same thing as "every person who" and shews that the provisions of the section apply to persons generally. In law a corporation is a person A limited company or a corporation is liable for using a false trade-mark or property-mark[2].

Statutory application—See the Bombay Abkari Act (V of 1878), s. 46(c).

PRACTICE.

Evidence.—For using a false trade-mark prove (1) that the accused marked the goods in question, or some case, package, or receptacle containing goods; or that he used some case, package, or receptacle bearing some mark.

(2) That the accused did as above in a manner reasonably calculated to cause it to be believed that the goods so marked, or the goods contained in the receptacle so marked, were the manufacture or merchandise of some person.

(3) That such goods are not the manufacture or merchandise of that person.

For using a false property-mark prove (1) that the accused marked moveable property or goods in question, or some case, package, or receptacle containing moveable property or goods; or that he used some case, package, or receptacle bearing some mark.

(2) That the accused did as above in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or the property or goods contained in the receptacle so marked, belonged to some person.

(3) That such property or goods do not belong to that person.

Onus—An important alteration of principle has been made in regard to offences under this section. Ordinarily, it is incumbent on the prosecution to

1 *Lokumal,* (1914) 8 S. L. R. 199.

2 *Serna M. Haniff & Co. v. Liptons Ltd.,* (1914) 7 L. B. R. 206; *Pakir Mahomed,* [1929] Cr. C. (Ran.) 498.

intent to defraud, he is entitled to be acquitted. Even though no cases of purchasers having been deceived by the use of false trade-mark are proved, this fact standing alone is insufficient to justify the contention that the accused acted without intent to defraud. The state of mind of the person responsible for the introduction of the trade-mark is a most relevant fact which can be established by evidence. In the absence of such evidence the accused cannot be held to have discharged the onus of proving want of intention which was upon him[1].

Procedure.—Not cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Presidency Magistrate, or Magistrate of the first or second class.

See ss. 8 and 9 of the Indian Merchandise Marks Act IV of 1889, the former of which provides for unintentional contravention of the law relating to marks and description, and the latter for forfeiture of goods when a person is convicted under this section. They run as follows:—

8. Where a person is accused under s. 482 of the Indian Penal Code of using a false trade mark or property mark by reason of his having applied a mark to any goods, property or receptacle in the manner mentioned in s. 480 or s. 481 of that Code, as the case may be, or under s. 6 of this Act of applying to goods any false trade description, or under s. 485 of the Indian Penal Code of making any die, plate or other instrument for the purpose of counterfeiting a trade mark or property mark and proves —

(*a*) that in the ordinary course of business he is employed, on behalf of other persons, to apply trade marks or property marks, or trade descriptions, or, as the case may be, to make dies, plates or other instruments for making, or being used in making, trade marks or property marks, and that in the case which is the subject of the charge he was so employed and was not interested in the goods or other things by way of profit or commission dependent on the sale thereof, and

(*b*) that he took reasonable precautions against committing the offence charged, and

(*c*) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the mark or description, and

(*d*) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons on whose behalf the mark or description was applied, he shall be acquitted.

9. (1) When a person is convicted under s. 482 of the Indian Penal Code of using a false trade mark, or under s. 486 of that Code of selling, or exposing or having in possession for sale or any purpose of trade or manufacture, any goods or things with a counterfeit trade mark applied thereto, or under s. 487 or s. 488 of that Code of making, or making use of, a false mark, or under s. 6 or s. 7 or this Act of applying a false trade description to goods or of selling, or exposing or having in possession for sale or any purpose of trade or manufacture, any goods or things to which a false trade description is applied, or is acquitted on proof of the matter or matters specified in s. 486 of the Indian Penal Code or s. 7 or s. 8 of this Act, the Court convicting or acquitting him may direct the forfeiture to Her Majesty of all goods and things by means of, or in relation to, which the offence has been committed or, but for such proof as aforesaid, would have been committed.

(2) When a forfeiture is directed on a conviction, and an appeal lies against the conviction, an appeal shall lie against the forfeiture also.

(3) When a forfeiture is directed on an acquittal and the goods or things to which the direction relates are of value exceeding fifty rupees, an appeal against the forfeiture may be preferred, within thirty days from the date of the direction, to the Court to which in appealable cases appeals lie from sentences of the Court which directed the forfeiture.

1 *Pakir Mahomed*, [1929] Cr. C. (Ran.) 498.

Civil action.—When a bona fide dispute exists between the parties as to the right to use a trade mark, action should be taken before a civil and not before a criminal Court[1].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, used a certain false trade-mark (*or* property mark), to wit——, to denote that certain goods were the manufacture of AB, whose manufacture they were not (*or* were the property of AB whose property they were not) in a manner reasonably calculated to cause it to be believed that such goods were the manufacture (*or* property) of AB; and that you thereby committed an offence punishable under s. 482 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

483. Whoever counterfeits[1] any trade mark or property mark used by any other person shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Counterfeiting a trade mark or property mark used by another.

COMMENT.

Where the trade mark of the complainant's goods contains a name to which [illegible] imilar trade [illegible] counterfeit [illegible] is what the general effect of the trade mark adopted by the accused is and whether an incautious purchaser would be led to believe that he is buying the complainant's goods[2].

1. **'Counterfeits'.**—See s 28, *supra.*

PRACTICE.

Evidence.—Prove (1) that the accused counterfeited the mark in question.

(2) That such mark is the trade mark or property mark of some person.

(3) That it was so used by that person.

Proced[illegible] permission is g[illegible] by Presidency [illegible]

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, counterfeited a trade mark or property mark, to wit——, used by AB, and that you thereby committed an offence punishable under s. 483 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

484. Whoever counterfeits[1] any property mark used by a public servant[2], or any mark used by a public servant to denote that any property has been manufactured by a particular person or at a particular time or place, or that the property is

Counterfeiting a mark used by a public servant

1 *Surja Prasad v. Mohabir Prasad*, (1907) 11 C. W. N. 887

2 *Nallaya Pillai*, (1895) 1 Weir 556.

intent to defraud, he is entitled to be acquitted. Even though no cases of purchasers having been deceived by the use of false trade-mark are proved, this fact standing alone is insufficient to justify the contention that the accused acted without intent to defraud. The state of mind of the person responsible for the introduction of the trade-mark is a most relevant fact which can be established by evidence. In the absence of such evidence the accused cannot be held to have discharged the onus of proving want of intention which was upon him[1].

Procedure.—Not cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Presidency Magistrate, or Magistrate of the first or second class.

See ss. 8 and 9 of the Indian Merchandise Marks Act IV of 1889, the former of which provides for unintentional contravention of the law relating to marks and description, and the latter for forfeiture of goods when a person is convicted under this section. They run as follows :—

8. Where a person is accused under s. 482 of the Indian Penal Code of using a false trade mark or property mark by reason of his having applied a mark to any goods, property or receptacle in the manner mentioned in s. 480 or s. 481 of that Code, as the case may be, or under s. 6 of this Act of applying to goods any false trade description, or under s. 485 of the Indian Penal Code of making any die, plate or other instrument for the purpose of counterfeiting a trade mark or property mark and proves —

(*a*) that in the ordinary course of business he is employed, on behalf of other persons, to apply trade marks or property marks, or trade descriptions, or, as the case may be, to make dies, plates or other instruments for making, or being used in making, trade marks or property marks, and that in the case which is the subject of the charge he was so employed and was not interested in the goods or other things by way of profit or commission dependent on the sale thereof, and

(*b*) that he took reasonable precautions against committing the offence charged, and

(*c*) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the mark or description, and

(*d*) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons on whose behalf the mark or description was applied, he shall be acquitted.

9. (1) When a person is convicted under s. 482 of the Indian Penal Code of using a false trade mark, or under s. 486 of that Code of selling, or exposing or having in possession for sale or any purpose of trade or manufacture, any goods or things with a counterfeit trade mark applied thereto, or under s. 487 or s. 488 of that Code of making, or making use of, a false mark, or under s. 6 or s. 7 or this Act of applying a false trade description to goods or of selling, or exposing or having in possession for sale or any purpose of trade or manufacture, any goods or things to which a false trade description is applied, or is acquitted on proof of the matter or matters specified in s. 486 of the Indian Penal Code or s. 7 or s. 8 of this Act, the Court convicting or acquitting him may direct the forfeiture to Her Majesty of all goods and things by means of, or in relation to, which the offence has been committed or, but for such proof as aforesaid, would have been committed.

(2) When a forfeiture is directed on a conviction, and an appeal lies against the conviction, an appeal shall lie against the forfeiture also.

(3) When a forfeiture is directed on an acquittal and the goods or things to which the direction relates are of value exceeding fifty rupees, an appeal against the forfeiture may be preferred, within thirty days from the date of the direction, to the Court to which in appealable cases appeals lie from sentences of the Court which directed the forfeiture.

[1] *Pakir Mahomed,* [1929] Cr. C. (Ran.) 493.

Civil action.—When a bona fide dispute exists between the parties as to the right to use a trade mark, action should be taken before a civil and not before a criminal Court[1].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, used a certain false trade-mark (*or* property mark], to wit——, to denote that certain goods were the manufacture of AB, whose manufacture they were not (*or* were the property of AB whose property they were not) in a manner reasonably calculated to cause it to be believed that such goods were the manufacture (*or* property) of AB; and that you thereby committed an offence punishable under s 482 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Counterfeiting a trade mark or property mark used by another.

483. Whoever counterfeits[1] any trade mark or property mark used by any other person shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

Where the trade mark of the complainant's goods contains a name to which ... imilar trade ... counterfeit ... is what the general effect of the trade mark adopted by the accused is and whether an incautious purchaser would be led to believe that he is buying the complainant's goods[2].

1. **'Counterfeits'.**—See s. 28, *supra*.

PRACTICE.

Evidence—Prove (1) that the accused counterfeited the mark in question.

(2) That such mark is the trade mark or property mark of some person.

(3) That it was so used by that person.

[illegible]

accused) as follows:—

That you, on or about the——day of——, at——, counterfeited a trade mark or property mark, to wit——, used by AB, and that you thereby committed an offence punishable under s. 483 of the Indian Penal Code, and within my cognizance

And I hereby direct that you be tried on the said charge

Counterfeiting a mark used by a public servant.

484. Whoever counterfeits[1] any property mark used by a public servant[2], or any mark used by a public servant to denote that any property has been manufactured by a particular person or at a particular time or place, or that the property is

[1] *Surja Prasad* v. *Mohabir Prasad*, (1907) 11 C. W. N 887.

[2] *Nallaya Pillai*, (1895) 1 Weir 556.

of a particular quality or has passed through a particular office, or that it is entitled to any exemption, or uses as genuine any such mark knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENT.

The offence under this section is an aggravated form of the offence described in the preceding one. An enhanced punishment is, therefore, given where a property mark used by a public servant is counterfeited.

1. **'Counterfeits'.**—See s. 28, *supra.*
2. **'Public servant'.**—See s. 21, *supra.*

PRACTICE.

Evidence.—Prove (1) that the accused counterfeited the property mark, or some other mark in question.

(2) That such mark is used by some public servant.

(3) That it was used to denote that the property had been manufactured by a particular person; or at a particular time or place; or that the property was of a particular quality, or had passed through a particular office, or was entitled to some exemption.

Or prove:—

(1) That the accused used the property mark, or some other mark in question.

(2) and (3) as above.

(4) That he used the mark as genuine.

(5) That when he used it he knew the same to be counterfeit.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, counterfeited any mark (*or* property mark), to wit——, used by a public servant, to wit——, to denote that some property was manufactured by AB [*or* at a particular time or place, to wit——, *or* that the property is of a particular quality, to wit—, or has passed through a particular office, to wit——, *or* that it is entitled to a certain exemption, to wit—] [*or* used as genuine a mark, to wit—knowing the same to be counterfeit], and that you thereby committed an offence punishable under s. 484 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* High Court)].

And I hereby direct that you be tried [*by* the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Making or possession of any instrument for counterfeiting a trade mark or property mark.

485. Whoever makes or has in his possession any die, plate or other instrument for the purpose of counterfeiting a trade mark or property mark, or has in his possession a trade mark or property mark for the purpose of denoting that any goods are the manufacture or merchandise of a person whose manufacture or merchandise they are not, or that they belong to a person to whom they do not belong, shall be punish-

ed with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

The making or possession of instruments for counterfeiting a trade mark or property mark is hereby punished. This section resembles ss 235, 256 and 472.

As to the definition of "possession," see s. 27, *supra*

PRACTICE.

Evidence.—Prove (1) that the accused made, or had in his possession, the die, plate, or instrument in question

(2) That such die, etc., was for the purpose of counterfeiting a trade mark or property mark.

Or prove—

(1) That the accused had in his possession the trade mark or property mark in question

(2) That he possessed such trade mark or property mark for the purpose of denoting that goods bearing such mark were the manufacture or merchandise of some person, or that they belonged to some person

(3) That such goods were not the manufacture or merchandise of that person or that they did not belong to that person.

Procedure—Not cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class

See ss. 8 and 9 of the Merchandise Marks Act, 1889, set out in the Appendix

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, sold (*or* exposed, *or* had in possession for sale, etc), certain goods, to wit——, a counterfeit trade mark [*or* property mark], to wit——, affixed to [*or* impressed upon] the said goods, to denote that they were the manufactures of AB; and that you thereby committed an offence punishable under s. 486 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Selling goods marked with a counterfeit trade mark or property mark.

486. Whoever[1] sells, or exposes, or has in possession[2] for sale or any purpose of trade or manufacture any goods or things with a counterfeit trade-mark[3] or property mark affixed to or impressed upon the same or to or upon any case, package or other receptacle in which such goods are contained, shall, unless he proves—

(*a*) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, and

(*b*) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or

(*c*) that otherwise he had acted innocently,

be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Limitation.—Prosecution should be instituted either before the expiration of three years after the commission of the offence or within one year from the first discovery of it by the prosecutor[1].

Forfeiture.—See s. 9 of the Merchandise Marks Act, 1889, set out in the Appendix.

Making a false mark upon any receptacle containing goods.

487. Whoever makes any false mark upon any case, package or other receptacle containing goods, in a manner reasonably calculated to cause any public servant or any other person to believe that such receptacle contains goods which it does not contain or that it does not contain goods which it does contain, or that the goods contained in such receptacle are of a nature or quality different from the real nature or quality thereof, shall, unless he proves that he acted without intent to defraud[1], be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

The fraudulent making of false marks of any description on goods for the purpose of deceiving public servants such as custom officers, is punishable under this section. Thus, importation of contraband goods under false marks will come under the purview of this section. This section, therefore, is more comprehensive than ss. 482 and 486.

1. **'intent te defraud'.**—See ss. 45 and 486, *supra.*

PRACTICE.

Evidence.—Prove (1) that the accused made some mark upon some case, package, or other receptacle containing goods.

(2) That such mark was a false mark.

(3) That he did so in a manner reasonably calculated to cause some public servant or some other person to believe (*a*) that such receptacle contained goods which it did not contain, or (*b*) that it did not contain goods which it did contain, (*c*) that the goods contained in such receptacle were of a nature or quality different from the real nature or quality thereof.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first or second class.

Forfeiture.—See s. 9 of the Merchandise Marks Act, 1889, set out in the Appendix.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, made a false mark, to wit——, upon a case, to wit——, (*or* package *or* other receptacle containing goods) in a manner reasonably calculated to cause a public servant, to wit——, (*or* AB) to believe that such case contains goods, to wit——, which it does not contain [*or* that it does not contain goods which it does contain (*or* that the goods contained in such receptacle are of a nature or quality different from the real nature or quality

1 Merchandise Marks Act, 1889, s. 15; *Ruppell* v. *Ponnusami Tevan*, (1899) 22 Mad. 488; *Akshoy Kumar Dey*, (1928) 32 C. W. N. 699.

thereof)], and that you thereby committed an offence punishable under s. 487 of the Indirn Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* High Court)]

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment for making use of any such false mark.

488. Whoever makes use of any such false mark in any manner prohibited by the last foregoing section shall, unless he proves that he acted without intent to defraud[1], be punished as if he had committed an offence against that section.

COMMENT.

This section punishes the making use of a false mark. The foreging section punished the making of such a mark.

1. **'Intent to defraud'.**—See ss. 45 and 486, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused made use of some mark upon some case, package, or receptacle containing goods.

(2) and (3) same as for s. 487.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Forfeiture.—See s. 9 of the Merchandise Marks Act, 1889, set out in the Appendix.

Charge.—See s. 487, *supra*.

Tampering with property mark with intent to cause injury.

489. Whoever removes, destroys, defaces or adds to any property mark, intending or knowing it to be likely that he may thereby cause injury[1] to any person[2], shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENT.

This section punishes the tampering with of a property-mark. Criminal intention or knowledge on the part of the accused is required under it.

1. **'Injury'.**—See s. 44, *supra*.

2. **'Person'.**—See s 11, *supra*.

PRACTICE.

Evidence.—Prove (1) that the mark in question is a property mark.

(2) That the accused removed, destroyed, or defaced, or added to, such mark.

(3) That he did so intending thereby to cause injury to some person; or that he did so knowing that he might thereby cause injury to some person.

Procedure.—Not cognizable—Summons—Bailable—Not [illegible]
Triable by Presidency Magistate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, removed (*or* destroyed, defaced *or* added to) a property mark, to wit——, intending [*or* knowing it to be likely], that you may thereby cause injury to AB, and that you thereby committed an offence punishable under s. 489 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Of Currency-Notes and Bank-Notes.

489A. Whoever counterfeits[1], or knowingly performs any part of the process of counterfeiting, any currency-note or bank-note, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Conterfeiting currency-notes or bank-notes.

Explanation.—For the purposes of this section and of sections 489B, 489C and 489D, the expression "bank-note" means a promissory note or engagement for the payment of money to bearer on demand issued by any person carrying on the business of banking in any part of the world, or issued by or under the authority of any State or Sovereign Power, and intended to be used as equivalent to, or as a substitute for, money.

COMMENT.

This section is similar to ss. 231 and 255.

Object.—Sections 489A, 489B, 489C and 489D were introduced by the Currency Notes Forgery Act (XII of 1899), s. 2, in order to provide more adequately for the protection of currency-notes and bank-notes from forgery. Under the Indian Penal Code, which was passed prior to the existence of a paper currency in India, currency-notes were not protected by any special provisions, but merely by the general provisions applying to the forgery of valuable securities. Before these sections were introduced, charges for forging currency-notes had to be preferred under s. 467, for uttering them, under s. 471, and for making or possessing counterfeit plates, under s. 472. The provisions of s. 467 afforded sufficient means of dealing both with forgery generally and with forgery of currency-notes. But it was at times difficult to obtain a conviction under the other sections.

1. **'Counterfeits'.**—See s. 28, *supra.*

PRACTICE.

Evidence.—Prove (1) that the note in question is a currency-note or bank note.

(2) That the accused counterfeited it, or knowingly performed any part of the process of counterfeiting it.

A conviction under this section cannot be maintained unless it is proved that the accused really intended to counterfeit and either did counterfeit or perform any part of the process of counterfeiting[1].

[1] *Meera,* (1917) 10 B. L. T. 255.

Procedure.—Cognizable—Warrant Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, counterfeited (*or* knowingly performed a part of the process of counterfeiting to wit——), a currency-note (*or* a banknote) (*state the value of the note*), and thereby committed an offence punishable under s. 489A of the Indian Penal Code and within the cognizance of the Court of Session.

And I hereby direct that you be tried by the said Court on the said charge.

Using as genuine forged or counterfeit currency-notes or bank-notes.

489B. Whoever sells to, or buys or receives from, any other person, or otherwise traffics in or uses as genuine[1], any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

[illegible]

1. **'Uses as genuine'.**—The words "as genuine" govern only the verb "uses" and not any other verb[2].

PRACTICE.

Evidence.—Prove (1) that the currency-note or bank-note in question was forged or counterfeited.

(2) That the accused sold to, or bought or received from, some person, or trafficked in, or used as genuine, such currency-note or bank-note.

(3) That when he did so he knew or had reason to believe that it was forged or counterfeited.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Onus of proof.—Where the accused is charged with using as genuine a forged note, the burden is on the prosecution to prove that at the time when the accused was passing the note he knew that it was a forged one, and the mere possession of it by him does not place the burden on him to account for its possession and to prove his innocent possession thereof[3].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at ——, sold to AB (*or* bought from AB, etc.), a forged (*or* counterfeit) currency-note, to wit——, knowing (*or* having reason to believe), the same to be forged (*or* counterfeit), and that you thereby

[1] *Rannum,* (1925) 27 P. L R. 583.
[2] *Bhika Ram,* (1925) 27 Cr. L. J. 638.
[3] *Habu,* (1924) [illegible] Cr. L. J. 935.

committed an offence punishable under s. 489B of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Possession of forged or counterfeit currency-notes or bank-notes.

489C. Whoever has in his possession[1] any forged[2] or counterfeit[3] currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

COMMENT.

This section deals with the mere possession of a forged or counterfeit currency-note or bank-note. It resembles ss. 242, 243 and 259.

1. **'Possession'.**—See s. 27, *supra.*
2. **'Forged'.**—See ss. 463, 464 and 470, *supra.*
3. **'Counterfeit'.**—See s. 28, *supra.*

PRACTICE.

Evidence.—Prove (1) that the currency-note or bank-note in question was forged or counterfeited.

(2) That the accused was in possession of it.

(3) That he at the time of his possession knew, or had reason to believe that it was forged or counterfeited.

(4) That he intended to use it as genuine or that it might be used as genuine.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, had in your possession a forged (*or* counterfeit) currency-note (*or* bank-note), to wit——, knowing (*or* having reason to believe) the same to be forged (*or* counterfeit) and intending to use the same as genuine or that it may be used as genuine, and that you thereby committed an offence punishable under s. 489C of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Making or possessing instruments or materials for forging or counterfeiting currency-notes or bank-notes.

489D. Whoever makes, or performs any part of the process of making, or buys or sells or disposes of, or has in his possession[1], any machinery, instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for forging or counterfeiting[2] any currency-note or bank-note, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section is analogous to ss. 233, 234, 256, 257 and 485. It was introduced into the Code by Act XII of 1899.

1. **'Possession'.**—See s. 27, *supra.*

2. **'Counterfeiting'.**—See s. 28, *supra.* For a thing to be termed counterfeit there should be some sort of resemblance sufficient to cause deception. In a case of counterfeiting currency notes, where the ability of the accused persons and the capacity of the materials with which they worked were not such as to produce a currency note which would take in even the most ignorant villager, it was held that there could be no conviction under this section read with s. 511 of the Code. The Court observed: "In the case of the counterfeiting of a currency note both ability and materials of a particular kind are required. If those materials and ability are not present, it cannot be said that an act performed without the ability to counterfeit and without materials which may help to a useful counterfeiting would be an attempt"[1]. Where the opinion of an expert witness was that with the use of the materials found in possession of the accused a five rupee note could be counterfeited and it was further discovered that the accused, who was a man of small means, had destroyed a five rupee note while treating it chemically, it was held that it might safely be presumed that the intention of the accused was to counterfeit a five rupee note with the materials produced in Court[2].

PRACTICE.

Evidence.—Prove (1) that the thing in question was a machinery, instrument or material necessary for or used in forging or counterfeiting a currency-note or bank-note.

"In some cases a mere inspection of the articles would satisfy the Court that they are capable of being used in the making of counterfeit notes But where that is not the case, it is the duty of the Crown to adduce evidence of a competent and qualified witness who would be able to explain to the Court the process by which the instruments or materials in question could be used in making a counterfeit note...Instruments and materials which may be useful in making correct drawings of the outlines of the designs and figures of a currency-note may be of no use whatever in manufacturing counterfeit notes"[3].

(2) That the accused made, or performed, some part of the process of making the machinery, instrument, or material, in question; or that he bought, sold, or disposed of it; or that he had it in his possession.

intended to be used for such purpose.

Before the Court could come to the conclusion that the accused had the objects in question for the purpose of counterfeiting, the prosecution should establish

plate, stone or other material or any instrument or device for engraving a bank-note". But "if the purpose and intention of the accused be proved, it is not necessary that all the articles required for counterfeiting should be found on him

1 *Jwala*, (1928) 51 All. 470.
2 *Ayyub*, (1928) 26 A. L. J. 1391.
3 Per Abdur Rahim, J., in *Abdul Rahiman*, (1911) 21 M. L. J. 766, 768, 769, 10 M. L. T. 108, 109, 110, F.B.

to hold him guilty of an offence under the section. A man may not be able to command all the articles required for the purpose but he may be actually proved to be in possession of only some. This would not deter the Court from convicting him of an offence under the statute"[1].

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, made (*or* performed any part of the process of making, *or* bought *or* sold *or* disposed of, *or* had in your possession) an instrument *or* material, to wit——, for the purpose of being used (*or* knowing *or* having reason to believe that it was intended to be used) for forging (*or* counterfeiting) a currency-note (*or* a bank-note), to wit——, and that you thereby committed an offence punishable under s. 489D of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

[1] Per Sundara Aiyar, J., in *Abdul Rahiman,* (1911) 21 M. L. J. 766, 773, 776.

CHAPTER XIX.

OF THE CRIMINAL BREACH OF CONTRACTS OF SERVICE.

Object.—The authors of the Code say: "We agree with the great body of jurists in thinking that in general a mere breach of contract ought not to be an offence, but only to be the subject of a civil action.

"To this general rule there are, however, some exceptions Some breaches of contract are very likely to cause evil such as no damages or only very high damages can repair, and are also very likely to be committed by persons from whom it is exceedingly improbable that any damages can be obtained. Such breaches of contract are, we conceive, proper subject for penal legislation"[1].

490. [*Repealed by Act III of 1925.*]

Breach of contract to attend on and supply wants of helpless person.

491. Whoever, being bound by a lawful contract[1] to attend on or to supply the wants of any person who, by reason of youth, or of unsoundness of mind, or of a disease or bodily weakness[2], is helpless or incapable of providing for his own safety or of supplying his own wants, voluntarily omits so to do, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both.

COMMENT.

Object.—The authors of the Code say :"We also think that persons who contract to take care of infants of the sick and of the helpless lay themselves under an obligation of a very peculiar kind, and may with propriety be punished [illegible]

Ingredients.—This section requires three essentials.— [illegible]

[illegible] bodily weakness.

3. Voluntary omission to perform the contract by the person bound by it.

1. 'Whoever, being bound by a lawful contract'.—Under this section it [illegible] that is to be [illegible] person, which [illegible] on 490, *supra*.

2. 'To attend on or to supply the wants of any person who, by reason of youth, etc.'—The Law Commissioners observe. "We are not prepared to punish as a criminal every menial servant, who quits his employer without a certain notice upon the expiration of the term for which he is hired, under ordinary circumstances. But we conceive that Clause 465 may be improved in one respect.

[1] Note P, p. 170.

[2] *Ibid*, p 171.

It seems, as it stands, not to be applicable to any but those servants who have contracted specially to attend upon the sick, insane, etc., but we think it should be made to apply to servants who are or ought to be in attendance upon a sick or insane master, though they may have only contracted with him in the ordinary way, while he was of sound body and mind, and to servants, whether engaged specifically for the purpose or not, who by the lawful command of their employers have been ordered to take care of young children and have not objected to do so"[1]. The accused, a cook, on a morning whilst the complainant's wife was ill and unable to supply her own wants, left his service without warning or permission. It was alleged that the illness of the complainant's wife was aggravated thereby. It was held that the accused was engaged only as an ordinary cook to a family, and was not bound to attend on, or to supply the wants of, any helpless person, and that, therefore, this section did not apply to such a case[2].

3 **'Voluntarily omits'.**—The omission to perform the contract must be without any reasonable cause. A person who is disabled by illness cannot be said to voluntarily omit. As to the meaning of the word 'voluntarily', see s. 39, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused entered into a contract to attend on or supply the wants of, the person in question.

(2) That such contract was a lawful one.

(3) That such person was helpless or incapable of providing for his own safety or of supplying his own wants.

(4) That such helplessness or incapableness was due to youth, or unsoundness of mind, disease or bodily weakness.

(5) That the accused omitted to attend on such person, or to supply his wants.

(6) That he did so voluntarily.

Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class—Triable summarily.

492. [*Repealed by Act III of 1925.*]

1 2nd Rep., s. 329.

2 *Solomon*, (1887) Cr. R. No. 43 of 1887, Unrep. Cr. C. 354.

CHAPTER XX.

OF OFFENCES RELATING TO MARRIAGE.

Cohabitaton caused by a man deceitfully inducing a belief of lawful marriage.

493. Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

Object.—This section punishes the offence committed when a man, either married or unmarried, induces a woman to become, as she thinks, his wife, but in reality his concubine. The form of the marriage ceremony depends on the race or [illegible]

race or creed as herself and thus inducing her to contract a marriage, in reality unlawful, but which, according to the law under which she lives, is valid. Suppose a person half English half Asiatic by blood, calls himself a Mahomedan or Hindu and by this deception causes a Mahomedan or a Hindu woman to go through the ceremony of marriage, in a form which she deems valid and to cohabit with him, he has committed this offence A man who deceives a woman into the belief that a certain ceremony which he causes to be performed by some accomplice, constitutes a valid marriage and thus induces the woman to cohabit with him, may be punished under this section[1].

The act falling within the purview of this section will also come under cl. 4 of s. 375

Ingredients.—The section has two ingredients :—

1. The deceit that causes a false belief in the existence of a lawful marriage.
2. Cohabitation or sexual intercourse with the person causing such belief.

PRACTICE.

Evidence.—Prove (1) that the accused caused the woman in question to believe that she was lawfully married to him

(2) That he induced that woman to cohabit with him under that belief.

(3) That he caused such belief by deceit.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Complaint by the person aggrieved is necessary.—No Court shall take cognizance of this offence except upon a complaint made by some person aggrieved by it[2].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, by deceit caused a certain woman, to wit AB, who was not lawfully married to you, to believe that she was lawfully married to you, and, in that belief cohabited or had sexual intercourse

[1] M. & M. 432.

[2] Criminal Procedure Code

with her; and that you thereby committed an offence punishable under s. 493 of the Indian Penal Code and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Marrying again during lifetime of husband or wife.

494. Whoever, having a husband or wife living[1], marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife[2], shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exception.—This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction:

nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

COMMENT.

This section punishes the offence known to English law as bigamy. It makes the offence of bigamy punishable both as regards a person, having a wife living, marrying another and as regards a wife, having her husband living, remarrying, in any case in which such re-marriage would be void by reason of its taking place during the life of such a wife or husband. The person to whom the woman is remarried cannot be punished under this section. He can only be charged with abetment of that offence[1].

Scope—This section does not apply to Hindu or Mahomedan males, who are allowed to marry more than one wife, but it applies to Hindu and Mahomedan females, and to Christians[2] and Parsis[3] of either sex.

Ingredients.—This section requires:—

1. Existence of the first wife or husband when the second marriage is celebrated.

2. The second marriage being void by reason of the subsistence of the first according to the law applicable to the person violating the provisions of the section.

1. 'Having a husband or wife living'.—The validity of a marriage in the case of Hindus, Mahomedans, Jews, Buddhists, Sikhs and Jains will be determined in accordance with their religious usages. In the case of Christians it will be determined by Act XV of 1872, of Parsis, by Act XV of 1865. The validity of a marriage celebrated under the Special Marriage Act[4] will be determined by its provisions.

1 *Munir*, (1925) 24 A. L. J. 155.
2 Act XV of 1872.
3 Act XV of 1865.
4 Act III of 1872, as amended by Act XXX of 1923.

If the first marriage is not a valid marriage no offence will be committed by contracting a second marriage. For instance, if A marries B, a person within prohibited degrees of affinity, and during B's life-time marries C, A has committed bigamy[1].

"A marriage, good by the laws of one country, is held good in all others where the question of its validity may arise. For the question always must be, Did the parties intend to contract marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than as intending a marriage contract"[2]. But a union formed between a man and a woman in a foreign country, although it may there bear the name of marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England unless it be formed on the same basis as marriages throughout Christendom, and be in its essence the voluntary union for life of one man and one woman to the exclusion of all others[3].

'Living'.—It must be shown that the husband or wife is alive at the date of the second marriage.

Mahomedan law allows a minor to repudiate marriage on attaining puberty.—"Under the Mahomedan law, when a child is given in marriage by any person [illegible] the option of either ratifying [illegible] difference between the Sunni [illegible] is that whereas according [illegible]

[illegible] cancelled by the minor. Both schools give to the minor an absolute power either to ratify or to cancel the unauthorised marriage. The (Hanafi) Sunny law presumes ratification when the girl after attaining the age of puberty has remained silent and has allowed the husband to consummate the marriage"[4] B, a Mahomedan girl, whose father was dead, was alleged to have been given in marriage by her mother to J., some years before she attained puberty Prior to her attaining puberty, J. was sentenced to a term of imprisonment for theft While he was in jail, B, after she had attained puberty, contracted a marriage with P. The marriage with J was never consummated. On J being released from jail, he proceeded to prosecut [illegible]
P with adultery. [illegible]
assuming that B [illegible]

[illegible]

1 *Chadwick*, (1847) 11 Q. B. 205. See *Kay*, (1887) 16 Cox 292.

2 *Warrender* v. *Warrender*, (1835) 2 Cl. & F. 488, 530, *Brinkley* v. *Attorney-General*, (1890) 15 P D. 76

3 *Bethell* v. *Hildyard*, (1888) 38 Ch. D. 220.

4 Per Amir Ali, J., in *Badal Aurat*, (1891) 19 Cal. 79, 82

5 [illegible] (1874) 1 Q. B. D. 44 [illegible] cution under this section

6 *Judoo Mussulmanee*, (1866) 6 W. R (Cr) 60

7 *Mussamat Chamia*, (1880) 7 C. L. R. 354; *Bissuram Koiree*, (1878) 3 C. L. R. 410.

8 *Karsan Goja : Bai Rupa*, (1864) 2 B H C. 117, *Ramjee Teli* v. *Ragho Teli*, (1899) 12 C. [illegible]

[illegible]

12 [illegible] Lah. 372.

Marriage during iddat.—In a Bombay Sessions case it was held that a Mahomedan woman marrying again during the lifetime of a husband who has divorced her but within the period of *iddat* is not guilty of bigamy[1]. The Calcutta High Court holds the same view. It has laid down that under Mahomedan law the marriage of a man, who subsequently embraces Christianity, becomes *ipso facto* void, notwithstanding his reconversion to Islam during the period of *iddat;* and the wife, in contracting a second marriage during such period, does not commit bigamy under this section. A second marriage contracted by the wife during the period of her *iddat* is not void by reason of its taking place during the life of the first husband but by reason of a special doctrine of the Mahomedan law with which the Penal Code has nothing to do[2]. The former Chief Court of the Punjab decided that a second marriage contracted with a woman whose husband was dead and who was in the state of observing her *iddat* being unlawful under the Mahomedan law, no conviction under this section was sustainable[3].

Divorce.—Divorce dissolves a valid marriage, and the parties obtaining such dissolution can re-marry. Divorce is unknown to Hindu law, though it is customary amongst lower classes of the Hindus. Divorce is allowed amongst the Mahomedans, the Parsis[4], and Native Christians[5].

2. 'Marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife'.—Where a person, already bound by an existing marriage, goes through with another person a form of marriage known to, and recognised by, the law as capable of producing a valid marriage, such person is guilty of bigamy, notwithstanding any special circumstances which, independently of the bigamous character of the marriage, may constitute a legal disability in the parties, or make the form of marriage resorted to inapplicable to their case[6]. It is immaterial even if the second marriage is void on another ground besides that of its being bigamous[7].

The word 'void' is not used in the technical sense in which it is used in Mahomedan law. The Code makes no distinction between a void and an invalid marriage and the term "void" as used in this section covers marriages of both classes[8].

It is immaterial whether the ceremony of the second marriage takes place within or beyond the King's dominions[9].

Good faith and mistake of law are no defences to a charge of bigamy[10]. It is no defence in law to an indictment for bigamy that the accused, at the time of the alleged bigamous marriage, believed, in good faith and on reasonable grounds, that he had been divorced from the bond of his first marriage, if in fact he had not been divorced[11].

Publication of banns of marriage.—The act of causing the publication of banns of marriage is an act done in the preparation to marry but does not amount to an attempt to marry. Where, therefore, a man having a wife living, caused the banns of marriage between him and a woman to be published, it was held that he could not be punished for an attempt to marry again during the life-time of his wife[12].

[1] *Sabiha*, (1907) 9 Bom. L. R. J. 207.

[2] *Abdul Ghani* v. *Azizul Huq*, (1911) 39 Cal. 409, 412.

[3] *Musst. Bibi*, (1882) P. R. No. 43 of 1882.

[4] The Parsi Marriage and Divorce Act, XV of 1865.

[5] The Native Converts' Marriage Dissolution Act, XXI of 1866.

[6] *Henry Allen*, (1872) L. R. 1 C. C. R. 367; *Jane Brawn*, (1843) 1 C. & K. 144. This view is not adopted in the Irish case of *Fanning*, (1866) 10 Cox 411, where it is said that English cases are distinguishable as the bigamous marriages in them were void for consanguinity and not for fornication.

[7] *Gurbaksh Singh* v. *Shama Singh*, (1876) P. R. No. 19 of 1876.

[8] *Allah Di*, (1928) 29 P. L. R. 533.

[9] *Russell*, [1901] A. C. 446.

[10] *Narantakath Avullah* v. *Parakkal Mammu*, 1922) 45 Mad. 986.

[11] *Thomas Wheat*, [1921] 2 K. B. 119.

[12] *Peterson*, (1876) 1 All. 316.

Whether custom a good defence to prosecution.—The Bombay High Court has ruled that Courts will not recognize the authority of a caste to declare a marriage void, or to give permission to a woman to re-marry. Bona fide belief that the consent of the caste made the second marriage valid does not constitute a defence to a charge of marrying again during the life-time of the first husband[1]. A custom of the Talpada Koli caste, that a woman could be permitted to leave the husband to whom she has been first married, and to contract a second marriage ... her first husband, and without his ...

life-time of such husband, and therefore ... this section[2]. Accused No. 1 was married to the complainant but the marriage was not consummated. Sometime after the marriage, the complainant went to ...

accused No 2. It was held that the release was inoperative and that both the accused were guilty of bigamy[3].

... allowed a wife ... by her husban[d] ... e Madras High Court evidence of any such custom should be allowed by Courts[6] In *Umi's* case[7], the Bombay High Court did give countenance to the custom of a caste which allowed a husband for a sufficient reason to divorce his wife In this case a member of the Ajanya Rajput Guzars caste executed a deed of divorce to his wife. The Court held on the evidence that the deed was proved; that in that caste a husband was, for a sufficient reason, such as incontinence, allowed to divorce his wife; that the deed had not been executed for a sufficient reason; and that, consequently, the parties entering into a second marriage were guilty of an offence under this section.

... According to Hindu law an apostate is not ... itrimonial bond remaining indissoluble ... by the mere fact of the conversion of ... . Hindu law does not recognize poly... woman who having a Hindu husband living marries a Mahomedan[9] or a Christian[10] even after becoming a Mahomedan or Christian, as the case may be, commits bigamy. A Hindu husband under similar circumstances commits no offence as Hindu law recognizes the right of a husband to contract a valid second marriage notwithstanding the continuance of a former marriage.

Conversion from Christianity.—The Madrass High Court once held that a Hindu Christian convert relapsing into Hinduism and marrying a Hindu woman,

... marriage.

2 *Karsan Goja: Bai Rupa*, (1864) 2 B. H. C. 117; *Keshav Hargovan v. Bai Gandi*, (1915) 17 Bom. L. R. 584

3 *Bai Ganga*, (1916) 19 Bom. L. R. 56, 4 Bom. Cr C. 3

4 *Jhuni*, (1892) 19 Cal. 627.

5 *Fagu Tanti*, (1925) 7 P. L. T. 443.

6 *Tholasingam*, (1896) 1 Weir 568.

7 (1882) 6 Bom 126.

8 *Ram Kumari*, (1891) 18 Cal. 264; *Mussumat Gholam Fatima*, (1870) P. R. No 32 of 1870.

9 *Ganga*, (1880) 4 Bom. 330; *Budamsa Routher v Fatema Bi*, [1914] M. W. N. 278, ... of 1869).

10 *Millard*, (1887) 10

cannot be convicted of bigamy on the ground that he has another wife living whom he married while a professed Christian[1]. It was so held on the ground that the Hindu law allowed polygamy on the part of a husband. The same High Court doubted the correctness of this ruling in a subsequent case in which a Native Christian, having a Christian wife living, married a Hindu woman according to Hindu rites without renouncing his religion. The Court held that he was guilty of bigamy and expressed an opinion that it would have made no difference even if he had renounced the Christian religion before contracting the second marriage[2]. But in a later case the former ruling has been followed and the latter has been dissented from. In this case a Hindu convert had married a Christian woman according to the rites of the Roman Catholic religion. Subsequently, and during the life-time of his Christian wife, he reverted to Hinduism and married a Hindu woman in accordance with the rites of the class to which the parties belonged. It was held that he was not guilty of bigamy[3].

A Christian cannot by embracing Mahomedanism marry a second time during the life-time of his first wife[4]. The accused, a Christian woman, who had married a Christian according to Christian rites and during the life-time of her husband had become a Mahomedan and married a Mahomedan according to Mahomedan rites was guilty of an offence under this section, notwithstanding the provisions of the Mahomedan law[5]. Whether a change of religion, made honestly after marriage with the assent of both spouses, without any intent to commit a fraud upon the law, will have the effect of altering rights incidental to the marriage, such as that of divorce, is a question of importance and of nicety not decided as yet[6].

Conversion from Mahomedanism.—A Mahomedan who becomes an Ahmediyan (a sect of Mahomedans) does not become an apostate and his wife is guilty of bigamy if she marries another during his life-time[7].

Exception.—The exception speaks of (1) the first marriage having been declared void by a Court; and (2) seven years' absence on the part of a spouse in a manner not heard of by the other party. Under the English law there is a third element, viz., bona fide belief in the spouse's death[8], which is not adopted in this exception. The proviso to this exception confines its application to cases in which the accused before the second marriage discloses the real state of the case, and such knowledge as he or she may have concerning the circumstances, to the person about to be married.

If the accused bona fide believed that the earlier marriage was set aside by the Court he would not be guilty[9].

If it is proved that the accused and his first wife have lived apart for the seven years preceding the second marriage, it is incumbent on the prosecution to shew that during that time he was aware of her existence; and, in the absence of such proof, the accused is entitled to be acquitted[10]. Even where the absence is the result of wilful desertion, it lies on the prosecution to shew, not merely that the person charged had the means of knowledge, but the person knew that the first consort was living[11]. But it has been held in two Indian cases that a woman,

1 (1833) 3 M. H. C. App. 7; *Michael*, (1886) 1 Weir 563.

2 *Lazar*, (1907) 30 Mad. 550.

3 *Antony*, (1910) 33 Mad. 371.

4 *Skinner* v. *Orde*, (1871) 14 M. I. A. 309, 324.

5 *Mussammat Ruri*, (1918) P. R. No. 5 of 1919.

6 *Robert Skinner* v. *Charlotte Skinner*, (1897) 25 Cal. 537, 546.

7 *Narantakath Avullah* v. *Parakkal Mammu*, (1922) 45 Mad. 986.

8 *Tolson*, (1889) 23 Q. B. D. 168.

9 *Karim Bakhsh*, (1918) P. W. R. (Cr.) No. 31 of 1918, *infra*.

10 *John Curgewen*, (1865) L. R. 1 C. C. R. 1; *Heaton*, (1863) 3 F. & F. 819.

11 *Faulkes*, (1903) 19 T. L. R. 250.

who, having the means of acquiring knowledge of the death of her first husband, does not choose to make use of them, and marries, commits bigamy[1].

The doctrine of a certain school of Mahomedan divines in regard to the competency of a woman to marry again after the absence of her husband for four years does not entitle a woman to re-marrying to the benefit of the exception[2].

Under this exception it is incumbent on the person contracting the second marriage, if it is contracted within seven years, to inform the other party about the first marriage[3].

Bona fide belief as to earlier marriage having been set aside by Court.—A ... On attaining puberty she ... she wished to repudiate it, ... et aside and later on the suit ... a form of marriage with K, ... under this section and s. 114. who was charged ... It was found that at the time of the marriage K did not know that the *ex parte* decree had been set aside and believed that it held good. It was held that inasmuch as by reason of a mistake of fact K thought that the previous marriage had been declared void by a Court of competent jurisdiction, he had not committed any offence[4].

Absence for seven years.—Where the accused's first wife had left him for ... she had known him for ... r heard of the first wife. ... ere the accused resided, ... accused's first husband it was held that the accused ... had been continually absent from her for seven years next preceding the second marriage, on which occasion she represented herself as a single woman, and was ... by her maiden name The jury found that they had no evidence that, at ... , but that she had means ... use of them. It was ... ported[5]. Where it was ... ed with her after the ... 2 W being still alive, he had gone through the form of marriage with another woman, but there was no evidence as to th ... they last saw eac ... Coleridge, C. J., ... evidence of the ... that the existing state continued"[7].

In 1864 W married A. In 1868 he was charged with bigamy in marrying B, his wife A being then alive, and was convicted In 1879 he married C and in 1880, C being then alive, he married D. Afterwards, upon a charge of bigamy in marrying D, C being then alive, W was convicted, it being held by the presiding Judge that there was no evidence that A was alive when W married C, or that the marriage with C was invalid by reason of A being then alive. It was held that the conviction could not be sustained, as the question should have been left to the jury whether upon the above facts A was alive or not when W married C[8].

Persons present at a bigamous marriage.—Mere consent of persons to be present at an illegal marriage, or their presence in pursuance of such consent, or

1 *Enai Beebee*, (1865) 4 W. R (Cr) 25; *Mussammat Muhammad Nissa*, (1899) P. R. No. 1 of 1900

2 *Alam Shah* v. *Jewan*, (1878) P. R No 27 of 1878.

3 *Enai Beebee*, (1865) 4 W. R. (Cr.) 25.

4 *Karim Bakhsh*, (1918) P. W. R. (Cr.) No. 31 of 1918

5 *Thomas Jones*, (1842) Car & Mar. 614.

6 *Mary Briggs*, (1856) 26 L. J. (M. C.) 7.

7 *Jones*, (1883) 11 Q B. D 118

8 *Willshire*, (1880) 6 Q B.

the grant of accommodation in a house for the marriage, does not necessarily constitute abetment of such marriage[1].

Abetment.—A man may be guilty of abetment although the girl herself may be, from want of intelligence or knowledge, incapable of committing this offence[2]. The wife of the first accused having left his house with her minor daughter, performed the marriage of the daughter with a boy. The first accused hearing of this applied to a Magistrate for a warrant under s. 100, Criminal Procedure Code, and thereupon the girl was handed over to him, and a few months later she was married by him to the second accused. Both the accused were then prosecuted for abetting the offence of bigamy. It was held that although a Hindu father was the proper person to give his daughter in marriage, the rule was firmly established that a marriage, which was duly solemnised and was otherwise valid, was not rendered void because it was brought about without the consent of the guardian in marriage or even in contravention of an express order of the Court; that even if the marriage was brought about by fraud and might on that account be declared invalid, it was not a nullity and was binding until it was set aside by a competent Court, and that unless it was declared to be invalid it could sustain an indictment for bigamy[3]. Where a Mahomedan guardian of a married female infant, while her husband was living, caused a marriage ceremony to be gone through in her name with another man, but without her taking any part in the transaction, it was held that he did not commit the offence of abetment under s. 109 and this section[4].

Priest officiating at a bigamous marriage.—The priest who officiates at a bigamous marriage is an abettor under this section and s. 109[5].

Statutes relating to marriage and divorce.—Act XV of 1865 (Parsis); Act XXI of 1866 (Act to legalize the dissolution of marriages of Native Converts to Christianity); Act IV of 1869 (Act to amend the law relating to Divorce and Matrimonial causes); Act III of 1872 (Special form of Marriages) as amended by Act XXX of 1923; Act XV of 1872 (Christians); Act VII of 1909 (Sikhs).

PRACTICE.

Evidence.—Prove the following facts:—

(1) That the accused had already been married to some person[6].

The provision of s. 50 of the Indian Evidence Act shows that where marriage is an ingredient of an offence, the fact of the marriage must be strictly proved[7]. Proof of actual marriage is always necessary; proof of marriage by cohabitation, reputation and other circumstances from which a marriage may be inferred is not sufficient[8]. A mere statement on the part of the accused that he had committed bigamy is not sufficient[9]. The Court should require some better evidence of the marriage than the mere statement of the complainant and the woman[10]. The Madras High Court has expressed its opinion that a husband or wife is not precluded from proving his or her marriage. Where, therefore, the complainant, the woman, and her mother swore to the fact of the marriage, it was held that the marriage was

1 *Umi*, (1882) 6 Bom. 126.
2 *Nand Lal Singh*, (1902) 6 C. W. N. 343; *Hub Ali*, (1923) 21 A. L. J. 187.
3 *Gajja Nand*, (1921) 2 Lah. 288.
4 *Abdool Kureem*, (1878) 4 Cal. 10. This case does not seem to lay down sound law.
5 *Umi*, (1882) 6 Bom. 126; *Millard*, (1887) 10 Mad. 218.
6 *Birbul* v. *Sawan*, (1874) P. R. No. 4 of 1874; *Alam Shah* v. *Jewan*, (1878) P. R. No. 27 of 1878; *Makandi* v. *Mohri*, (1893) P.R. No. 17 of 1893.
7 *Pitambur Singh*, (1879) 5 Cal. 566, F.B., overruling *Wazira*, (1872) 8 Beng. L. R. App. 63, 17 W. R. (Cr.) 5; *Shivana*, (1883) Unrep. Cr. C. 190; *Kallu*, (1882) 5 All. 233.
8 *Morris* v. *Miller*, (1767) 4 Burr. 2057, 2059.
9 *Daniel Flaherty*, (1847) 2 C. & K. 782; *Lindsay*, (1902) 66 J. P. 505, 18 T. L. R. 761. Contra, *John Newton*, (1843) 2 M. & Rob. 503.
10 *Dal Singh*, (1897) 20 All. 166.

sufficiently proved[1]. A marriage may be established by preponderating repute and by conduct, even though the repute may be divided[2]. Where there is prima facie evidence of cohabitation as man and wife, and a long course of treatment of the woman as wife and the children as legitimate, the presumption of marriage can be repelled only by evidence of the clearest character. Much weight must be attached

Evidence of the identity of the accused on the occasions both of the first and of the second marriage is necessary. On an indictment for bigamy, a photographic likeness of the first husband was allowed to be shown to the witnesses

It is also incumbent upon the prosecution to prove the validity of the first marriage[6]. A civil marriage between persons professing Roman Catholic faith is valid[7]. Where the first marriage took place not within any part of the British dominions but in a foreign country, and there is a question concerning the validity of such marriage, the law of the foreign country must be ascertained On an indictment for bigamy the validity of a foreign marriage must be proved by the evidence of a professional lawyer or of a person who is to be deemed by reason of his office to be skilled in the law of the country where it was celebrated[8]. The g … a foreign country is, that b … the law of the place where it … re If invalid there, it is equally invalid everywhere. But there are exceptions to this rule On the one hand a Christian country would not recognise, as lawful, polygamy or some incestuous marriages contracted by Christians while residing in Mahomedan or other countries. On the other hand, where there is a local necessity from the absence

to be valid according to the law of the native country. Thus, persons residing in factories, in conquered places and in desert or barbarous countries, or in countries of an opposite religion, are allowed to contract a marriage there according to the laws of their country[9].

… e British … [10] … iage by the common law of England, it must have been celebrated in the presence of a

R 17; *Saldanha*, (1929) Criminal Appeal No. 32 of 1919, decided by Blackwell and K. Kemp, JJ, on September 19, 1929 (Unrep Bom.)

8 *Moscovitch*, (1927) 44 T. L R. 4

9 M. & M. 433

10 *Budamsa Routher* v. *Fatema Bi*, [1914] M W. N. 278, 26 M L J. 260.

11 *Beamish* v *Beamish*, … L.C

according to the law of the country in which it was celebrated. If the marriage is proved by a person present at it, it is not necessary to prove the registration, or license, or banns[1].

Proof of marriage amongst the Hindus.—There is no statutory marriage law for the Hindus, and the validity of any particular marriage depends chiefly on the usages of the caste to which the parties belong[2].

Proof of marriage amongst the Mahomedans.—At a marriage between Mahomedans, a Mullah, with the necessary witnesses and vakils, is always present to read the *sigha*. He should, therefore, be called as a witness. The *sigha* recited at the marriage of minors is different from that recited at the marriage of adults. There should be evidence to show that *akd* was performed[3]. Where, however, the father of a minor girl is present at her marriage and is a consenting party no special recitations are necessary to make a valid marriage under the *Hanafi* law[4].

Proof of marriage amongst the Parsis.—This can be proved by the production of the certificate given under s. 6 of the Parsi Marriage and Divorce Act, 1865, or a certified extract from the register of marriages under s. 7 of the Act.

Proof of marriage amongst the Native Christians.—This can be proved by a certified copy of any entry of a marriage in the Marriage Register under s. 80 of the Indian Christian Marriage Act[5].

Proof of marriage amongst the Jews.—In order to prove a Jewish marriage it is not sufficient to produce a witness who was present at the religious ceremony in the synagogue, a written contract (*katuba*) between the parties being essential to the validity of the marriage, production and proof of the execution of such document is necessary[6]. Jews domiciled in England cannot validly contract a marriage within the degrees prohibited by English law[7].

(2) That the person with whom he had married was still living. The prosecution must prove to the satisfaction of the Court that the husband or wife, as the case may be, was alive at the date of the second marriage. This is purely a question of fact. The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the Court would in all probability find that he was so. If, on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, the Court would probably decline to draw that inference. The law makes no presumption either way. The Legislature sanctions a presumption that a person who has not been heard of for seven years is dead[8]; but this affords no ground for the converse proposition, viz., that when a party has been seen or heard of within seven years, a presumption arises that he is still living[9].

Whether evidence is necessary, on the part of the prosecution, to show that the accused married, knowing his second wife to be alive, depends upon the particular facts of each case[10]. Positive proof that at the time of his second marriage the accused knew that his first wife was alive is not absolutely necessary[11].

(3) That the accused married another person.

The celebration of the second marriage is proved in the same manner as that of the first.

[1] *William Allison*, (1806) R. & R. 109.
[2] *Subbarayan*, (1885) 9 Mad. 9.
[3] *Badal Aurat*, (1891) 19 Cal. 79.
[4] *Sheikh Alimuddin*, (1906) 10 C. W. N. 982
[5] Act XV of 1872.
[6] *Althausen*, (1893) 17 Cox 630. See *Nathan* v. *Wolf*, (1890) 16 T. L. R. 250; *Benjamin* v. *Benjamin*, (1925) 50 Bom. 369, 28 Bom. L. R. 328.
[7] *De Wilton*: *De Wilton* v. *Montefiore*, [1900] 2 Ch. 481; *Benjamin* v. *Benjamin*, sup.
[8] See the Indian Evidence Act, s. 108.
[9] *Lumley*, (1869) L. R. 1 C. C. R. 196, 198.
[10] *Ellis*, (1858) 1 F. & F. 309.
[11] *David Jones*, (1869) 11 Cox 358.

(4) That the second marriage was void by reason of its taking place during the life of the first spouse[1].

Procedure.—Not cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class.

Complaint by the person aggrieved is necessary.—Under s 198 of the Code of Criminal Procedure no Court shall take cognizance of an offence falling under this section except upon a complaint made by some person aggrieved by such offence This section is intended to prevent Magistrates from inquiring into cases coming under ss 493 to 496, unless the husband or some person aggrieved lodges a complaint It is not necessary, however, that a complainant should state precisely the section of the Code under which the accused shall be charged. It is sufficient if the complainant lays before the Magistrate matters which, if proved, would be sufficient to warrant a commitment under this section[2]

The brother of a lunatic husband is not a 'person aggrieved' by the wife's bigamy, and he is not competent to complain[3] Similarly, the brother of the second (bigamous) husband[4] or the father of the first husband[4] of the accused is not a 'person aggrieved'. The person aggrieved is either the first husband or the second[6].

Venue.—The proper Court to try a charge under this section is the Court which has territorial jurisdiction at the place where the offence was committed. Persons accused of abetting the commission of the offence are triable by the Court within whose territorial jurisdiction the abetment takes place[7]

Charge.—I (*name and office of Magistrate, etc,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——da

to wit——, living, married again AB,

its taking place during the life-time o

thereby committed an offence punishable under s 494 of the Indian Penal Code and within the cognizance of the Court of Session (*or* High Court)

And I hereby direct that you be tried by the said Court on the said charge[8].

Punishment.—Where a woman who has been left largely to her fate by her husband and has been living in adultery with a paramour marries that paramour, she is guilty only of a technical offence and deserves only nominal punishment[9]. As to the Frontier District, see the *Frontier Crimes Regulation, 1901*, ss. 11 (3) (*d*) and 12 (2).

495. Whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Same offence with concealment of former marriage from person with whom subsequent marriage is contracted

1 *Musst. Bibi*, (1882) P. R. No. 43 of 1882; (1870) 1 Weir 565, F B

2 *Alli*, (1902) 25 All 209, *Ujjain Bewa*, (1878) 1 C L R 523.

3 *Bai Rukshmoni*, (1886) 10 Bom 340.

4 *Imtiazan*, (1902) 25 All. 132.

5 *Lala*, (1900) 32 All 78.

6 *Deputy Legal Remembrancer* v. *Sarna Kahmi*, (1899) 26 Cal 336; *Lala*, sup.

7 *Mussamat Bhaguatia*, (1924) 3 Pat. 417; *Goverdhan Ridkaran*, (1928) 30 Bom. L. R. 387, 9 Bom Cr. C 268

8 (1867) 3 W. R. (Cr. L.) 9.

9 *Ritha*, (1925) 27 Cr. L. J. 74.

COMMENT.

Object.—This section provides a higher penalty when the fact of the former marriage is concealed from the person with whom the subsequent marriage is contracted.

The authors of the Code say: "The act which in the English law is designated as bigamy is always an immoral act. But it may be one of the most serious crimes that can be committed. It may be attended with circumstances which may excuse though they cannot justify it.

"The married man who, by passing himself off as unmarried, induces a modest woman to become, as she thinks, his wife, but in reality his concubine, and the mother of an illegitimate issue, is guilty of one of the most cruel frauds that can be conceived. Such a man we would punish with exemplary severity.

"But suppose that a person arrives from England, and pays attentions to one of his countrywomen at Calcutta. She refuses to listen to him on any other terms than those of marriage. He candidly owns that he is already married. She still presses him to go through the ceremony with her. She represents to him that if they live together without being married, she shall be an outcast from society, that nobody in India knows that he has a wife, that he may very likely never fall in with his wife again, and that she is ready to take the risk. The lover accordingly agrees to go through the forms of marriage.

"It cannot be disputed that there is an immense difference between these two cases. Indeed, in the second case the man can hardly be said to have injured any individual in such a manner as calls for legal punishment. For what individual has he injured? His second wife? He has acted by her consent, and at her solicitation. His first wife? He has certainly been unfaithful to his first wife. But we have no punishment for mere conjugal infidelity. He will often have injured his first wife no more than he would have done by keeping a mistress calling that mistress by his own name, introducing her into every society as his wife, and procuring for her the consideration of a wife from all his acquaintance. The legal rights of the first wife and of her children remain unaltered. She is the wife; the second is the concubine. But suppose that the first wife has herself left her husband, and is living in adultery with another man. No individual can then be said to be injured by this second invalid marriage. The only part injured is society, which has undoubtedly a deep interest in the sacredness of the matrimonial contract, and which may therefore be justified in punishing those who go through the forms of that contract for the purpose of imposing on the public.

"The law of England on the subject of bigamy appears to us to be in some cases too severe, and in others too lenient. It seems to bear a close analogy to the law of perjury. The English law on these two subjects has been framed less for the purpose of preventing people from injuring each other, than for the purpose of preventing the profanation of a religious ceremony. It therefore makes no distinction between perjury which is intended to destroy the life of the innocent, and perjury which is intended to save the innocent; between bigamy which produces the most frightful suffering to individuals and bigamy which produces no suffering to individuals, at all. We have proceeded on a different principle. While we admit that the profanation of a ceremony so important to society as that of marriage is a great evil, we cannot but think that evil immensely aggravated when the profanation is made the means of tricking an innocent woman into the most miserable of all situations. We have therefore proposed that a man who deceives a woman into believing herself his lawful wife when he knows that she is not so, and induces her, under that persuasion, to cohabit with him, should be punished with great severity.

"There are reasons similar, but not exactly the same, for punishing a woman who deceives a man into contracting with her a marriage which she knows to be invalid. For this offence we propose a punishment which, for reasons too obvious

to require explanation, is much less severe than that which we have provided for a similar deception practised by a man on a woman"[1].

The authors of the Code intended to punish with greater severity only the man who deceived a woman. But the section as it stands applies to either party.

CASES.

Concealment of the fact of the first marriage at the time of contracting the second.—A woman, who does not use all reasonable means in her power to inform herself of the fact of her first husband's alleged demise, and con- [illegible]

Infant marriage.—Where a child of ten years was married again during the life-time of her husband, the marriage being negotiated and caused to be performed by the mother of the accused, it was held that the child had not attained sufficient maturity of understanding to judge of the nature and consequences of her conduct on the occasion of the second marriage[3].

PRACTICE.

Evidence—Prove the same points (1) to (4) as those for s 461, and further—

(5) That the accused, when marrying the second person, concealed from such person the fact of the former marriage.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Complaint by the person aggrieved is necessary.—See s. 493, *supra*[4]

Marriage ceremony fraudulently gone through without lawful marriage.

496. Whoever, dishonestly or with a fraudulent intention, [illegible] of being married[1], [illegible] lawfully married[2], [illegible] isonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

Ingredients.—The section requires two essentials—

1. Dishonestly or with a fraudulent intention going through the ceremony of marriage

2 Knowledge on the part of the person going through the ceremony that he is not thereby lawfully married

1. 'Dishonestly or with a fraudulent intention, goes through the ceremony of being married'.—The essence of this offence is that the marriage ceremony should be fraudulently gone through and that there should be no lawful marriage.

See s. 24 as to the meaning of 'dishonestly', and s. 25, as to that of 'fraudulent intention'.

2. 'Knowing that he is not thereby lawfully married'.—The accused must have the knowledge that there is no marriage. A case of bigamy is not contemplated by this section. Where it is intended that there should be a valid marriage and that there should be only a show of marriage for some ulterior and

1 Note Q, pp. 171, 172.

2 *Enas Beebee*, (1865) 4 W. R. (Cr.) 25.

3 *Godi*, (1896) Unrep Cr. C. 786.

4 Criminal Procedure Code, s. [illegible]

fraudulent purpose, the case does not come under this section[1]. The section punishes mock marriages. It applies to cases in which a ceremony is gone through which would in no case constitute a marriage, and in which one of the parties is deceived by the other into the belief that it does constitute a marriage or in which effect is sought to be given by the proceeding to some collateral fraudulent purpose. Where the ceremony gone through does, but for the previous marriage, constitute a valid marriage, and both parties are aware of the circumstances of the previous marriage, s. 494 applies[2].

An abuse of the marriage ceremony where no deceit is practised on the woman, and no dishonest or fraudulent intent is proved, is not an offence under this section.

Sections 493 and 496.—The two sections are somewhat alike; the difference appears to be that under s. 493 deception is requisite on the part of the man, and cohabitation or sexual intercourse consequent on such deception. The offence under s. 496 requires no deception, cohabitation, or sexual intercourse as a *sine qua non*, but a dishonest or fraudulent abuse of the marriage ceremony. In the latter case the offence can be committed by a man or a woman, in the former only by a man.

Abetment.—The mere act of allowing the marriage to take place at one's house does not amount to an abetment of illegal marriage[3].

PRACTICE.

Evidence.—Prove (1) that the accused went through the ceremony of marriage.

(2) That when he went through such ceremony he knew that he was not thereby lawfully married to the complainant.

(3) That he did as in (1) dishonestly or with a fraudulent intention[4].

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Complaint by the person aggrieved is necessary. See s. 493, *supra*[5].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, dishonestly (*or* fraudulently) went through the ceremony of being married to AB, knowing that you were not thereby lawfully married, and that you thereby committed an offence punishable under s. 496 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Adultery.

497. Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man[1], without the consent or connivance of that man[2], such sexual intercourse not amounting to the offence of rape[3], is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term, which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

1 *Sheikh Alimuddin,* (1906) 10 C. W. N. 982.
2 *Rama Sona,* (1873) Cr. R. July 1873, Unrep. Cr. C. 77.
3 *Kudum,* (1864) W. R. (Gap. No.) (Cr.) 13.
4 *Ibid.*
5 Criminal Procedure Code, s. 198.

COMMENT.

The framers of the Code did not make adultery an offence punishable under the Code. But the Second Law Commission, after giving mature consideration to the subject, came to the conclusion that it was not advisable to exclude this offence from the Code. Adultery figures in the penal law of many nations and some of the most celebrated English laywers have considered its omission from the English law as a defect.

This section applies to Europeans who are in British India[1].

Ingredients.—The section requires the following essentials.—

1. Sexual intercourse by a man with a woman who is and whom he knows or has reason to believe to be the wife of another man

2. Such sexual intercourse must be without the consent or connivance of the husband

3 Such sexual intercourse must not amount to rape

1. 'Sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man' —The Law Commissioners have limited the cognizance of this offence to adultery committed with a married woman, and the male offender alone has been made liable to punishment. Thus, under the Code, adultery is an offence committed by a third person against a husband in respect of his wife. It is not committed by a man who has sexual intercourse with an unmarried woman, or with a widow, or even with a married woman whose husband consents to it. In s 488 of the Code of Criminal Procedure the word 'adultery' is used in the wide and ordinary sense of voluntary sexual connection between either of the parties to the marriage and some one, married or *single, of the opposite sex other than the offender's own spouse. It is used in the* popular sense of the term, viz., a breach of the matrimonial tie by either party[2].

Why is wife not punished as an abettor.—The authors of the Code say: "Though we well know that the dearest interests of the human race are closely connected with the chastity of women and the sacredness of the nuptial contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives. The condition of the women of this country is, unhappily, very different from that of the women of England and France, they are married while still children, they are often neglected for other wives while still young They share the attentions of a husband with several rivals To make laws for punishing the inconstancy of the wife, while the law admits the privilege of the husband to fill his zenana with women, is a course which we are most reluctant to adopt. We are not so visionary as to think of attacking, by law, an evil so deeply [illegible] We leave it to [illegible] But while [illegible] he happiness [illegible] already too much depressed, the additional weight of the penal law [illegible]

The reasons giv[illegible] convincing nor satis[illegible] the woman also were [illegible] her, and in France and in China she is punished.

In the Punjab Frontier Districts, in the North-West Frontier Province and in Baluchistan a married woman is punishable for adultery[4].

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1 *Hunter*, (1920) 2 U P. L. R. (A.) 419

2 *Gantapalli Appalamma* v. *Gantapalli Yellayya*, (1897) 20 Mad. 470, F B.

3 Note Q, p. 175. See *Khark Singh*, (1881) P. R. No 36 of 1881.

4 See Frontier Crimes Regulation, III of 1901, ss 12 and 30.

'Reason to believe to be the wife of another man'.—See s. 26 *supra*, as to the meaning of the expression 'reason to believe'. Where a prisoner accused of adultery sets up in defence a *natra*, contracted with the woman with whom he was alleged to have committed adultery, in accordance with the custom of his caste, it was held that the question the Court had to determine was, whether or not the accused honestly believed, at the time of contracting the *natra*, that the woman was the wife of another man[1]. Where the accused, after abducting the wife of another, lived with her in adultery and, subsequently, remarried her in the *nikah* form with her consent, it was held that the accused was guilty of offences under this section and s. 109 read with s. 494[2].

It is not necessary that the adulterer should know whose wife the woman is, provided he knew she was a married woman[3]. A *nekai* wife is a wife within the meaning of this and the following sections[4].

2. **'Without the consent or connivance of that man'.**—'Consent' here is a permission to the paramour on the part of the husband to have connection with his wife.

'Connivance' is the willing consent to a conjugal offence, or a culpable acquiescence in a course of conduct reasonably likely to lead to the offence being committed[5]. Connivance is an act of the mind, it implies knowledge and acquiescence. As a legal doctrine, connivance has its source and its limits in the principle, *volenti non fit injuria*, a willing mind, this is all that is necessary[6]. To constitute 'connivance' there "must be something more than mere negligence; than mere inattention; than over-confidence; than dulness of apprehension; than mere indifference: It must be intentional concurrence"[7]. Connivance is a figurative expression meaning a voluntary blindness to some present act or conduct, to something going on before the eyes, or something which is known to be going on without any protest or desire to disturb or interfere with it[8]. "To establish connivance it is requisite, not that the party conniving should actually be an accessory before the fact, so as to have taken any active measure to bring about the result of adultery, but that he should be cognizant that such a result would follow from certain transactions that he approved of and consented to"[9]. The mere fact that the husband, on being informed by the police that his wife had been discovered at a certain place, expressed his unwillingness to take her back on the ground that she had lost her religion, was not evidence of the husband having connived at her living a life of adultery with the accused[10].

3. **'Such sexual intercourse not amounting to the offence of rape'.**—In rape the consent of the woman is wanting. Under this section the offence is committed even though the woman is a consenting party. In rape the woman may be a married woman or not, under this section the woman must be the wife of another. Rape may be committed even by a husband when the wife is under thirteen years of age.

See s. 375, *supra*.

Attempt.—Adultery being an act which requires the consent of both the parties, it appears that for a man to be guilty of an attempt it is not sufficient that he was found in a place in which adultery might have been committed and that he

1 *Manohar Raiji*, (1868) 5 B. H. C. (Cr. C). 17.
2 *Munir*, (1925) 24 A. L. J. 155.
3 *Madhub Chunder Giri Mohunt*, (1873) 21 W. R. (Cr.) 13.
4 (1865) 4 W. R. (Cr. L.) 1.
5 Stroud's Judicial Dictionary.
6 *Boulting* v. *Boulting*, (1864) 33 L. J. (P. M. & A.) 81.
7 Per Sir John Nicholl in *Rogers* v. *Rogers*, (1830) 3 Hagg. Ecc. 57, 59; *Phillips* v. *Phillips*, (1844) 1 Rob. 144; *Allen* v. *Allen*, (1859) 30 L. J. (P. M. & A.) 2.
8 *Gipps* v. *Gipps*, (1864) 11 H. L. C. 1; *Munir*, sup.
9 *Glennie* v. *Glennie*, (1862) 32 L. J. (P. M. & A.) 17, 20.
10 *Munir*, sup.

was minded to commit it[1]. Where a married woman went to visit a man, but before adultery was committed, she was taken away by her husband, it was held that the man could not be convicted of an attempt to commit adultery[2].

PRACTICE.

Evidence.—Prove (1) that the accused had sexual intercourse with the woman in question.

The sexual intercourse required for adultery being the same identical thing as the sexual intercourse required for rape, the evidence of sexual intercourse on a charge of adultery must not be stronger than that in a suit for a divorce. The best proof available must always be produced, but in both cases evidence of opportunities sought for and obtained and of familiarities which point strongly to an [illegible] the fact of sexual intercourse[3].

[illegible] ife of an absent person for several weeks [illegible] bed for a number of days and of considerable attachment between the accused and the woman where there is no allegation that the accused is impotent, is, although circumstantial, sufficient evidence to prove sexual intercourse between them[4].

(2) That she was then the wife of another man

Strict proof is necessary of the marriage of the woman[5] The actual fact of the marriage between the complainant and the woman must be proved in some way or another[6]. Any inference of tacit admission on the part of the accused will not avail the prosecution if they fail to prove that relationship strictly In India where no registration prevails, it is necessary to set out the facts and circumstances surrounding the alleged ceremony of the marriage in order to enable the Court to determine the question whether the marriage in fact took place and whether the relationship of husband and wife in fact existed at the time of the prosecution[7]

(3) That the accused knew, or had reason to believe, that she was the wife of another man.

The question the Court has to determine is, whether or not the accused honestly believed that the woman was the wife of another man[8].

(4) That such man did not consent to, or connive at, such intercourse.

A person may call the woman with whom he is accused of having had sexual intercourse as a witness on his behalf[9]

The admission of a man and a woman coupled with the evidence of the witnesses to the effect that the two lived together as man and wife leads to the inevitable presumption that acts of adultery must have been committed[10]. Adultery need not and generally speaking cannot be proved by direct evidence[11]

Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class

Death of husband does not put an end to prosecution.—The death of the husband does not necessarily put an end to a prosecution under this section[12].

Complaint by the person aggrieved is necessary.—No Court shall take cognizance of the offence except upon a complaint made by the husband of the woman

[illegible]

R. (A) 419

4 *Hunter*, *ibid*

5 [illegible] (1865) 4 W. R. (Cr.) 31 ; (1867) 4 [illegible]

J. 107, 27 Cr. L. J. 651, *Raghupat Singh*, (1927) 4 O. W. N. 172.

6 *Bhagu Dhondi*, (1914) 17 Bom. L. R. 75, 3 Bom. Cr C. 8.

7 *Ganga Patra*, (1928) 29 Cr L. J. 1045.

8 *Manohar Raiji*, (1868) 5 B. H. C. (Cr. C.) 17.

9 [illegible] (1866) 6 W. R. (Cr.) 92.

[illegible]

(1922) 4 Lah. 7.

or, in his absence, by some person who had care of such woman on his behalf at the time when such offence was committed[1]. It is submitted that a husband who has obtained a divorce cannot be a complainant because divorce puts an end to the relationship of husband and wife[2].

Although a man cannot be charged with adultery except by the husband of the woman with whom he commits it, yet he may be charged with and convicted of house-trespass with intent to commit adultery, without the husband himself making the charge, if there is no consent or connivance on the part of the latter[3]. In a case the accused was found in the complainant's house by night, and he stated that he was there for the purpose of carrying on an intrigue with the complainant's wife. The complainant refused to lay a complaint of house-trespass with intent to commit adultery. It was held that the Magistrate was right in refusing to convict him of a charge which the husband refused to make[4]. Where an accused person was committed to the Sessions Court to stand his trial on a charge preferred by a husband under s. 376, and the Sessions Judge at the trial added a charge of adultery under this section and acquitted the accused under s. 376, but convicted him under this section, it was held that the Session Judge had acted without jurisdiction[5]. The Court of Session may add charges under this section and s. 498, in the manner indicated in s. 226 and the sections following of the Code of Criminal Procedure, when the complaint of the husband is not merely of offences involving the use of force but was also a specific complaint of the offence punishable under the aforesaid sections[6]. Where in a prosecution under s. 366 the husband of the woman appeared as a witness and asked the Magistrate to drop the proceedings under s. 366 as he intended to prosecute the accused under s. 498, it was held that the statement made by the husband, as a witness, fell within the definition of complaint as defined in s. 4, cl. (*h*), of the Code of Criminal Procedure, and therefore a conviction under s. 498, treating the statement made by the husband as a complaint, was legal[7].

Withdrawal of charge.—Where the husband of a woman, with whom the accused was alleged to have committed adultery, professed himself unwilling to proceed with the prosecution, and the Judge thereupon ordered the accused to be discharged, the High Court, in the exercise of its discretion, declined to interfere[8]. But in an Allahabad case it has been ruled that a charge of adultery cannot be withdrawn by a complainant with the Magistrate's consent[9].

Orders for re-trial and examination of wife.—In an enquiry into a case of alleged adultery and enticing away a married woman for illicit purposes, the complainant refused to examine his wife as to the marriage. The Deputy Magistrate declined to frame a charge and discharged the accused. The Sessions Judge directed a re-trial to be held by another Deputy Magistrate and ordered that the evidence of the wife should be taken as to the marriage. It was held that the Sessions Judge in ordering a re-trial had not exercised a proper discretion, he having admitted that the prosecution had failed to prove the marriage, and it not being alleged that any evidence was tendered by the prosecution and not taken by the Deputy Magistrate[10].

Offender liable to a conviction for every fresh act.—Where a man who has been convicted of adultery with another man's wife, continues his adulterous in-

1 Criminal Procedure Code, s. 199. See *Luckhy Narain Nagory*, (1875) 24 W. R. (Cr.) 18; *Faiz Ahmed*, (1878) P. R. No. 5 of 1879; *Hashmat*, (1882) P. R. No. 19 of 1882; *Rahmutulla*, (1882) P. R. No. 10 of 1883; *Jit Mal*, (1887) P. R. No. 4 of 1888; *Piran Ditta*, (1895) P. R. No. 23 of 1895; *Kallu*, (1882) 5 All. 233; *Nga Po Thaw*, (1912) U. B. R. 155.

2 *Wilkinson* v. *Gibson*, (1867) L. R. 4 Eq. 162; *Prole* v. *Soady*, (1868) 3 Ch. App. 220.

3 (1868) 3 Mad. Jurist 285.

4 (1869) 5 M. H. C. App. 5.

5 *Chemon Garo*, (1902) 29 Cal. 415.

6 *Rajani Kanta Shaha* v. *Idris Thakur*, (1921) 34 C. L. J. 51.

7 *Bhawani Dat*, (1926) 38 All. 276.

8 *Ramlo Jerio*, (1868) 5 B. H. C. (Cr. C.) 27.

9 *Gumbheer*, (1870) 2 N. W. P. 234.

10 *Chunder Nath Ghose* v. *Nundololl Chatterji*, (1884) 11 Cal 81.

tercourse, he will be liable to a second conviction and punishment for the fresh act, notwithstanding that the woman has not returned to the protection of her husband after the conviction of her paramour[1]. The offence of adultery is not a continuing offence. Every act of sexual intercourse amounts to an offence of adultery. Patkar, J., said · "Adultery is an infringement of the rights of the husband towards his wife, and when the offender has once been convicted or acquitted of the offence of adultery, which consisted of one sexual intercourse, he cannot with impunity commit another offence of adultery"[2]

Mayne is of opinion that a man cannot be convicted of adultery a second time in respect of the same woman, if she is not taken back by her husband. But there is nothing in the section to support this view.

Charge.—A charge of adultery, alleging commission of offences between two dates, is legal where it is impossible, in the circumstances of the case, to assign particular dates on which sexual intercourse took place[3].

It should run thus—

I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows ·—

That you, on or about the——day of——, at——, committed adultery with AB, knowing or having reason to believe her to be the wife of CD, and without the consent or connivance of the said CD; and that you thereby committed an offence punishable under s. 497 of the Indian Penal Code, and within my cognizance [or within the cognizance of the Court of Session (or High Court)]

And I hereby direct that you be tried [by the said Court (*if the case is tried by Magistrate omit these words*)] on the said charge

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation 1901, ss 11 (3) (*d*), and 12 (2).

Enticing or taking away or detaining with criminal intent a married woman.

498. Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man[1], from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person[2], or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

Sections 361 and 366 may be compared with this section which comes into operation when the two former sections fail to apply.

Ingredients. [illegible]

1 Tak[illegible] ... [illegible] e wife of another man from (*a*) [illegible] on behalf of that man

2 Such taking, enticing, concealing or detaining must be with intent that she may have illicit intercourse with any person[4]

This and the preceding sections are evidently intended for the protection of husbands, who alone can institute prosecutions for offences under them.

1 *Emaji*, (1880) Cr R October 28, 1880, Unrep Cr C 150.
2 *Shankar Tulshiram*, (1928) 30 Bom L. R 1435, 1436, 9 Bom. Cr C. 465
3 *Bhola Nath Mitter*, (1924) 41 Cal 488
4 *Ganesh Ram v. Gyan C*[illegible] Cr. L. J. 139.

1. 'Takes or entices away any woman who is...the wife of any other man'.—'Enticing' implies some blandishment or coaxing. It is the taking or enticing of the wife from the husband or the person having the care of her on behalf of the husband for the illicit purpose that constitutes the offence. It is none the less taking, although the advances and solicitations proceeded from the woman and the accused had for some time refused to yield to her request[1]. If in point of fact the husband had, previously to the accused's alleged act of taking or enticing away the woman, turned his wife out of his house, it cannot be said that, under such circumstances, she was taken from her husband within the meaning of the section, which evidently contemplates that the woman should be at the time living under the protection of her husband or of some one acting on his behalf[2]. The fact that the woman accompanied the accused of her own free will does not diminish the criminality of the act[3].

It is the enticement or taking away from the husband and not the enticement to any person which constitutes the offence. If, therefore, it is clearly proved that a man has enticed the woman away from her husband's control with intent that she may have illicit intercourse with any person and she has actually left her husband's control without any definite intention to return or with the intention to remain away from her husband's protection indefinitely, the offence is complete as regards the person who has so enticed the woman, who may, as a matter of fact, not be her paramour at all, but some third person, even though the woman and her paramour should never meet at all[4]. For the purposes of a conviction under this section there must be an intention that the woman should leave her husband's control without any definite intention that she should return to him, or an intention that she should remain away indefinitely[5].

'Whom he knows or has reason to believe to be the wife of another man'.—The woman must be the wife of another man. If the marriage is voidable then this section does not apply[6].

If a particular union between two persons is recognized as marriage, then the taking or enticing away the woman with a party to such union will amount to an offence under this section. Thus, where the accused enticed away a woman, who was the illegitimate daughter of a Brahmin father and Bania mother and who had married a Bania, it was held that the accused was guilty as such a marriage was recognized by the caste to which the husband belonged and was not invalid according to Hindu law[7]. Where by custom a marriage with a widow is valid and the accused abducted a woman so married with knowledge of the marriage, it was held that he was guilty of an offence under this section[8].

Mahomedan law.—*Iddat.*—According to Mahomedan law if a woman marries before the expiry of *iddat* the marriage is null and void. Where a woman had married her husband's brother during her *iddat* and subsequently married the accused, it was held that the accused had committed no offence under this section[9].

The complainant, a Mahomedan, alleged that he had been married six times: that all the wives were living, but that he kept two of the first four partially divorced (i.e., by pronouncing the words of divorce only once or twice and not thrice) in order to legalize his marriage with the fifth and the sixth, and so kept within the law which permitted him to have four wives. The accused was charged with abducting or committing adultery with the sixth wife. It was held that the woman in question was not the wife of the complainant[10].

1 *Kumarasami*, (1865) 2 M. H. C. 331.
2 *Mihan Singh*, (1883) P. R. No. 15 of 1883, p. 26.
3 *Jan Mahomed*, (1902) 4 Bom. L. R. 435.
4 *Gaman*, (1899) P. R. No. 9 of 1899.
5 *Ahmed*, (1917) P. L. R. No. 145 of 1917.
6 *Bulanda*, (1910) P. W. R. (Cr.) No. 33 of 1910.
7 *Madan Gopal*, (1912) 34 All. 589; *Anandaw*, (1927) 104 I. C. 708.
8 *Gobindu*, (1918) P. R. No. 10 of 1919.
9 *Isa* v. *Ranon*, (1911) P. W. R. No. 1 of 1912, P. L. R. No. 83 of 1912.
10 *Rab Nawaz Khan*, (1874) P. R. No. 1 of 1875.

Where a wife, who was deserted by her husband, went of her own free-will, to live with another man, a conviction under this section was set aside, as there was no enticing or taking away[1].

'Woman'.—See s. 10, *supra.*

'Reason to believe'.—See s 26, *supra.*

'Conceals or detains such woman'.—The words 'conceals or detains' are intended to be applied to the enticing or inducing a wife to withhold or conceal [illegible] as to physical restraint [illegible] band of his proper control [illegible] gist of the offence, and a detention occasioning such deprivation may be brought about simply by the influence of allurements and blandishments[2] Detention does not necessarily imply that it is against the consent of the person detained Where a married woman left her husband's house and went to another man's and lived with him as his wife, it was held that the man with whom she lived had committed an offence under this section[3]. If a man keeps the wife of another under his protection in a house he detains her within the meaning of this section[4] But there can be no detention where the woman is living with a man of her own free-will and refuses to go back with her husband[5].

The words 'such woman' do not mean such woman as has been so enticed away as mentioned in the section, but mean such woman whom the accused knows or has reason to believe to be the wife of any other man; the detention of such a woman with the particular intent defined in the section is one of the offences made punishable under the section[6]. In an earlier case the same High Court had expressed the opinion, though the point had not been specifically discussed, that a person could not be convicted of detaining an enticed woman until the enticing had been proved[7] This interpretation gives the go bye to the latter part of the section which makes concealment or detention of such woman punishable and is [illegible] ured by him for her [illegible] absence, living under [illegible] s 498—provided, of course, that.. he knew, or had reason to know, that she was the wife of the man from whose protection he took her, or on whose behalf the person from whom he took her had charge of her, and also provided that he took her with the intent specified in the Act. To hold otherwise would be to declare the worst cases of seduction not punishable under the Penal Code"[8].

2. 'With intent that she may have illicit intercourse with any person' —Intention is the gist of this offence The intention must be that the woman should have unlawful sexual intercourse with a person

A person who entices away a married woman from her husband's house with intent that he may dispose of her in marriage to some one else commits an offence under this section, because sexual intercourse between the woman and any other person to whom she has thus been given in marriage, during the lifetime of her husband, would be illicit intercourse within the meaning of this section[9].

1 *Porhun Chung,* (1865) 2 W. R. (Cr.) 35; *Pahlwan,* (1914) P L R No 129 of 1915, P W R (Cr) No 5 of 1915.

2 *Sundara Dass Tevan,* (1868) 4 M H. C 20.

3 (1872) 7 Mad Jur 133

4 *Bansi Lal* v. *Ali Muhammad,* (1913) P. L R. No 319 of 1913, P W. R No 36 of 1913

5 *Lachman Chamar,* [illegible] L. J. 311; *Ocharhal Ahir,* (1927) [illegible]

6 *Naidar,* (18[illegible]) [illegible] *Balish,* (1891) P. R No. [illegible]

7 *Tika Singh,* [illegible]

8 Per Jackson [illegible] *Khan* v. *Murghi* [illegible] (Cr.) 50.

9 *Naurang,* [illegible]

Where a procuress induced a married woman of twenty to leave her husband, and the fact showed that the wife had made her deliberate choice and was determined, of her own free-will, to leave her husband and become a prostitute in Calcutta, the High Court held that the procuress could not be convicted of kidnapping under s. 366, but was guilty of enticing away a married woman under this section, "for whatever the wife's secret inclinations were, she would have had no opportunity of carrying them out had not the prisoner interposed"[1]. The complainant alleged that his father-in-law had detained his wife, and that with his help the accused married his wife and since then had kept her in his (accused's) house. The accused was convicted under this section. It was held that the conviction was bad inasmuch as there was no evidence whatever to show that the accused enticed away the complainant's wife from her husband's or her father's house with intent to have illicit intercourse with her[2].

3. **'Or conceals or detains with that intent'.**—Where a woman is clearly willing and has not been restrained in any way, she cannot be said to be 'detained' so as to justify conviction under this section, the meaning of the word 'detained' being kept back from some body or restrained[3]. The mere fact that the woman was seen outside the accused's house is not sufficient[4].

Sections 360 and 498.—Section 366 applies to cases where, at the time of the abduction, the woman has no intention of marriage or illicit intercourse at the time when the abduction takes place, but it is the intention of the person abducting to compel her afterwards to marry any person against her will, or to force or seduce her afterwards to illicit intercourse. Section 498 applies to cases where the object of the taking or enticing is that the woman may have illicit intercourse with some other person, even though, as it generally happens, she is quite aware of the purpose for which she is quitting her husband, and is an assenting party to it.

Again, an offence punishable under s. 498 is a minor offence as compared with an offence punishable under s. 366[5].

Wife cannot be punished as abettor.—In the case of adultery it is distinctly enacted that the wife is not punishable as an abettor; it is, therefore, inconsistent to punish her as an abettor of the minor offence mentioned in this section[6]. It has been left an open question whether a woman can be convicted of abetting the 'taking away' of herself within the meaning of this section[7]. Enticement denotes a state of passivity on the part of the woman, and hence does not come within the three clauses of s. 107 which imply a certain degree of activity in the abettor. If a woman requested a man to take her away her act would probably be covered by s. 107, cl. (1).

Alyasanatan law.—The cohabitation of man and woman under the Alyasanatan system is not considered to be a marriage so as to render punishable a person who entices away the woman with the intent specified in the section[8].

PRACTICE.

Evidence.—Prove (1) that the woman in question is the wife of another man.

The provisions of s. 50 of the Indian Evidence Act show that where marriage is an ingredient in an offence the fact of the marriage must be strictly proved[9]. It is not sufficient for the prosecution to prove that the complainant and the woman in

[1] *Srimotee Poddee*, (1864) 1 W. R. (Cr.) 45.
[2] *Jasimuddin Sheikh* v. *Ichohak Mistri*, (1897) 1 C. W. N. 498.
[3] *Abdul Wahid Khan*, (1927) 1 Luck. C. 238, 28 Cr. L. J. 703.
[4] *Deonandan*, (1920) 21 Cr. L. J. 383.
[5] *Jatra Shekh* v. *Reazat Shekh*, (1892) 20 Cal. 483.
[6] *Phalla* v. *Jivan Sing*, (1871) P. R. No. 6 of 1871; *Mohun* v. *Gunsham*, (1871) P. R. No. 8 of 1871, overruling *Syed Ahmud*, (1868) P. R. No. 17 of 1868.
[7] *Balambal*, (1902) 26 Mad. 463.
[8] *Koraga*, (1883) 6 Mad. 374.
[9] *Pitambur Singh*, (1879) 5 Cal. 566, F. B.

respect of whom the charge is made lived together as man and wife[1]. Strict proof of marriage is necessary[2]; it cannot be presumed[3]. Long co-habitation may raise a presumption of marriage but a conviction cannot be based on such presumption[4]. The admission by the accused that the woman is the wife of the prosecutor is not enough[5]. The Court should require some better evidence of the marriage than the mere statement of the complainant and the woman[6]. The Madras High Court has, however, held that the evidence of the husband and wife is sufficient to prove the marriage[7]. The fact and the legality of the marriage are material elements in a case of enticing or taking away or detaining with criminal intent a married woman and must be proved as strictly as any other material facts, but it is not necessary that they should be proved in any particular way[8]. The law presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously for a number of years and at the time of the commencement of cohabitation a marriage between them was possible. This presumption of law can be repelled only by strong, distinct and conclusive evidence, and the mere fact that the direct evidence of the marriage which took [illegible]

a spouse is not illegal[10].

The fact that the marriage of the enticed with the complainant was voidable at the option of the enticed is not a defence, unless it is shown that that option was exercised before the enticement[11].

(2) That she was under the care of her husband, or of some one on his behalf.

(3) That the accused took or enticed her away from her husband or that other person, or concealed, or detained her

(4) That the accused knew, or had reason to believe, that she was the wife of another man.

There must be evidence of some kind from which the inference could be drawn that the accused knew the woman to be a married woman. mere presumption that he must have known it is not sufficient[12]. The omission to state in the charge that the accused had the knowledge or reason to believe is not by itself fatal to the charge[13].

(5) That the accused did as above with intent that she might have illicit intercourse with some person.

The Code does not exonerate a man merely because there is connivance by the husband[14].

Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class

[illegible] 1893

[4] *Vir Singh*, (1929) 30 P L R. 643, 30 Cr. L. J. 1051.

[5] *Phikku*, (1925) 2 O. W. N. 586, 26 Cr. L. J. 1376.

[6] *Dal Singh*, (1897) 20 All. 166; *Kallu*, (1882) 5 All 233, *Santol Singh*, (1898) 18 A. W. N. 186, *Padam Singh*, (1906) 3 A L. J. 224n; *Budhu*, (1920) 42 All. 401, *Pirthi*, (1900) 3 O C. 342, *Phikku*, sup

[7] *Subbarayan*, (1885) 9 Mad. 9

[8] *Nazir Khan*, (1913) 36 All 1

[9] *Indar Singh* v *Thakar Singh*, (1921) 3 L. L. J. 317.

[illegible] (1920)

[14] *Ganesh Ram* v *C*[illegible] (1 Cr. L. J. 139.

Complaint by the aggrieved person is necessary.—No Court shall take cognizance of this offence unless upon a complaint made by the husband of the woman, or, in his absence, by some person who had care of such woman[1]. Complaint by a man who has purchased a married woman is not competent[2].

The intention of the law is to prevent Magistrates inquiring, of their own motion, into cases connected with marriage unless the husband or other person authorized moves them to do so. But where the husband is a complainant and brings his complaint under s. 366, a conviction under this section may properly be had if the evidence be such as to justify a conviction for the minor offence, and yet insufficient for a conviction for the graver one[3]. But this view has not been adopted in some cases[4]. In a Bombay case, the accused was tried on charges under ss. 363 and 366. At the conclusion of the case, the Court added a charge under this section and convicted the accused on all the three charges. It was held that the procedure in the case was not regular; and the additional charge framed at the stage it was framed was prejudicial to the accused. The Court set aside the conviction under this section and ordered an inquiry into the remaining charges[5].

Where, in a case in which the complaint was of the offences of kidnapping a minor girl and theft of her jewels, there was no allegation even in the sworn statement of the complainant that the accused's purpose was to have illicit intercourse with her daughter, and there was not even a statement as to puberty; it was held that there was no complaint of an offence under this section, so as to give the Magistrate jurisdiction to try and convict the accused of such an offence[6]. Though a person having the care of a woman on behalf of her husband can lodge a complaint, such person cannot compound an offence under that section and an acquittal based on a compounding of offence by such person is erroneous[7]. A prosecution under this section does not abate merely on account of the death of the injured party[8]. Detention of a married woman is a continuing offence and a person committing such an offence is always liable to prosecution except for any period in respect of which he has been found innocent. Acquittals in respect of previous detentions are no bar to a fresh charge for a subsequent detention[9].

Sections 497 and 498.—A person convicted of adultery under s. 497 of the Code need not be convicted also under this section[10].

Finding.—A finding exactly in the words of this section—that the accused took or enticed away a married woman from her husband; or some person having the care of her on his behalf, with intent that she may have illicit intercourse with any person, or concealed or detained such woman with a like intent—though not actually illegal, when it is doubtful which of the several offences has been committed, is a finding which ought not to be resorted to if it can be avoided, and it can be determined under which part of the section the accused is guilty[11].

Place of trial.—A complaint under this section for detaining a woman for the purpose of illicit intercourse can be enquired into only in the district where such detention occurs[12].

1 Criminal Procedure Code, s. 199; *Nihala*, (1909) P. W. R. (Cr.) No. 22 of 1909.

2 *Mughlu*, (1925) 26 P. L. R. 382.

3 *Jatra Shekh* v. *Reazat Shekh*, (1892) 20 Cal. 483.

4 *Chemon Garo*, (1902) 29 Cal. 415; *Isap Mahomed*, (1906) 31 Bom. 218, 9 Bom. L. R. 148; *Kallu*, (1885 All. 233; *Bangaru*, (1903) 27 Mad. 61; *Bhana*, (1910) P. R. No. 32 of 1910; *Roda Singh*, (1917) P. R. No. 2 of 1918; *Khushal Singh*, (1904) 17 C. P. L. R. 105. See *Bhawani Dat*, (1916) 38 All. 276.

5 *Isap Mahomed*, sup.

6 *Arunachalam Chetty*, (1923) 45 M. L. J. 543, [1923] M. W. N. 876.

7 *Fateh Muhammad*, (1919) 4 L. L. J. 488; *Mir Alam*, (1922) 5 L. L. J. 183.

8 *Manj Din*, (1922) 4 Lah. 7; *Nur Muhammad*, (1907) 8 Cr. L. J. 190.

9 *Nadar*, (1920) 4 L. L. J. 535.

10 *Pochun Chung*, (1865) 2 W. R. (Cr.) 35

11 *Mothoora Nath Roy*, (1874) 22 W. R. (Cr.) 72.

12 *Jaswant Singh*, (1916) P. L. R. No. 51 of 1918, P. W. R. (Cr.) No. 8 of 1918.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, took away (*or* enticed away, *or* concealed, *or* detained) a certain woman, to wit AB, whom you knew or had reason [illegible]
the care of [illegible]
illicit interc[illegible]
punishable under s. 498 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Punishment.—Where the accused was convicted of an offence under this section and it appeared that the woman being not on good terms with her husband went to the accused of her own accord, a [illegible] ment was considered to be too severe[1]. [illegible] ends of justice when the abducted wom[illegible] husband did not care much about his wife and did not take any action against the accused for a number of months after her abduction[3].

[1] *Rasul Khan*, (1910) P. L. R. No. 33 of 1910, P. W. R. (Cr.) No. 60 of 1910.
Lal Khan, (1914) P. W. R. (Cr.) No. 20 of 1914, P. L. R. No. 123 of 1914, *Chandgi* (1926) 28 Cr. L. J. 52.

[3] *Gahra*, (1925) 26 P. L. R. 429.

CHAPTER XXI.

OF DEFAMATION.

Defamation.

499. Whoever by words either spoken or intended to be read, or by signs or by visible representations[1], makes or publishes any imputation concerning any person[2] intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person[3], is said, except in the cases hereinafter excepted, to defame that person.

Explanation 1.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.—An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4.—No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

ILLUSTRATIONS.

(*a*) A says—"Z is an honest man; he never stole B's watch"; intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it fall within one of the exceptions.

(*b*) A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

(*c*) A draws a picture of Z running away with B's watch, intending it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

Imputation of truth which public good requires to be made or published.

First Exception.—It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Public conduct of public servants.

Second Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Conduct of any person touching any public question.

Third Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character so far as his character appears in that conduct, and no further.

ILLUSTRATION.

It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested

Publication of reports of proceedings of Courts.

Fourth Exception.—It is not defamation to publish a substantially true report of the proceeding of a Court of Justice, or of the result of any such proceedings.

Explanation.—A Justice of the Peace or other officer holding an enquiry in open Court preliminary to a trial in a Court of Justice is a Court within the meaning of the above section.

Merits of case decided in Court or conduct of witnesses and others concerned.

Fifth Exception.—It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

ILLUSTRATIONS.

(*a*) A says—"I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest". A is within this exception if he says this in good [illegible] the opinion which he expresses respects Z's character as it [illegible] [illegible] Z's conduct as a witness.

Merits of public performance.

Sixth Exception.—It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or [illegible]

character of the author so far as his character appears in such performance, and no further.

Explanation.—A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

ILLUSTRATIONS.

(*a*) A person who publishes a book, submits that book to the judgment of the public.

(*b*) A person who makes a speech in public, submits that speech to the judgment of the public.

(*c*) An actor or singer who appears on a public stage, submits his acting or singing to the judgment of the public.

(*d*) A says of a book published by Z—"Z's book is foolish; Z must be a weak man. Z's book is indecent; Z must be a man of impure mind". A is within this exception, if he says this in good faith, inasmuch as the opinion which he expresses of Z respects Z's character only so far as it appears in Z's book, and no further.

(*e*) But if A says—"I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine", A is not within this exception, inasmuch as the opinion which he expresses of Z's character is an opinion not founded on Z's book.

Censure passed in good faith by person having lawful authority over another.

Seventh Exception.—It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

ILLUSTRATION.

A Judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department censuring in good faith those who are under his orders; a parent censuring in good faith a child in the presence of other children; a schoolmaster, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils; a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier—are within this exception.

Accusation preferred in good faith to authorized person.

Eighth Exception.—It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

ILLUSTRATION.

If A in good faith accuses Z before a Magistrate; if A in good faith complains of the conduct of Z, a servant, to Z's master; if A in good faith complains of the conduct of Z, a child, to Z's father—A is within this exception.

Ninth Exception.—It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.

Imputation made in good faith by person for protection of his or other's interests.

ILLUSTRATIONS.

(*a*) A, a shopkeeper, says to B, who manages his business—"Sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty". A is within the exception, if he has made this imputation on Z in good faith for the protection of his own interests

(*b*) A, a Magistrate, in making a report to his superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith, and for the public good, A is within the exception

Tenth Exception.—It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

Caution intended for good of person to whom conveyed or for public good.

500. Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Punishment for defamation

COMMENT.

In the words of the authors of the Code, "the essence of the offence of defamation consists in its tendency to cause that description of pain which is felt by a person who knows himself to be the object of the unfavourable sentiments of his fellow-creatures, and those inconveniences to which a person who is the object of such unfavourable sentiments is exposed"[1]

The criminal law of this country with regard to defamation depends on the construction of s 499, not on what may be the English law on the same subject[2]. According to the theory of the criminal law of England the essence of the crime of private libel consists in its tendency to provoke a breach of the peace Under the Penal Code, defamation has been made an offence without any reference to its tendency to cause acts of illegal violence. The authors of the Code observe: "It appears to us evident that between the offence of defaming and the offence of provoking to a breach of the peace, there is a distinction as broad as that which separates theft and murder Defamatory imputations of the worst kind may have no tendency to cause acts of violence Words which convey no discreditable imputation whatever may have that tendency in the highest degree Even in cases where defamation has a tendency to cause acts of violence, the heinousness of [illegible]

[1] Note R, p 175

[2] [illegible] (1870) 14 W. R. (Cr.) [illegible]

[illegible] 49 Mad 728, F [illegible]

as a provocation to a breach of the peace. A scurrilous satire against a friendless woman, published by a person who carefully conceals his name, would be defamation in one of its most odious forms. But it would be only by a legal fiction that the satirist could be said to provoke a breach of the peace. On the other hand, an imputation on the courage of an officer contained in a private letter, meant to be seen only by that officer and two or three other persons, might, considered as defamation, be a very venial offence. But such an imputation would have an obvious tendency to cause a serious breach of the peace"[1].

Ingredients.—The section requires three essentials:—

1. Making or publishing any imputation concerning any person.
2. Such imputation must have been made
   (*i*) by words either spoken or intended to be read; or
   (*ii*) by signs; or
   (*iii*) by visible representations.
3. Such imputation must have been made with the intention of harming, or with knowledge or reason to believe that it will harm, the reputation of the person concerning whom it is made.

1. 'Makes or publishes any imputation concerning any person'.—Everyone who composes, dictates, writes or in any way contributes to the making of a libel, is the maker of a libel. "If one dictates, and another writes, both are guilty of making it, for he shews his approbation of what he writes. So, if one repeats, another writes a libel, and a third approves what is written, they are all makers of it, as all who concur and assent to the doing of an unlawful act are guilty; and murdering a man's reputation by a libel may be compared to murdering a man's person, in which all who are present and encourage the act are guilty, though the wound was given by one only"[2]. Where a person merely describes the thumb impressions of signatories by writing their names opposite their thumb-impressions on a defamatory petition, he cannot be said to have made it[3].

'Publishes'.—The making known the defamatory matter after it has been written to some person other than the person of whom it is written, is publication in its legal sense. The defamatory matter must be published, that is, communicated to some person other than the person to whom it is addressed[4]. Communicating defamatory matter to the person defamed only is not publication[5]. It is sufficient if the accused intentionally does an act which has the quality of communicating to a third person or persons generally the alleged libel. It is not necessary for the prosecution either to allege or to prove that the act of the accused was directed at communicating the libel to any specified person or persons or that the libel, as a matter of fact, was brought to the notice of such person or persons[6]. The action of a person who sent to a public officer by post, in a closed cover, a notice containing imputations on the character of the recipient, but which was not communicated by the accused to any third person, was held to be not such a 'making' or 'publishing' of the matter complained of as to constitute this offence[7]. Where, therefore, a number of persons meet and resolve not to associate with a person for good reasons there is no defamation, nor does the sending a copy of

[1] Note R, pp. 175, 176.

[2] Bacon's Abrid., Vol. IV, p. 457; *Paine*, (1696) 5 Mod. 163, 165.

[3] *Lingangauda Basangauda Patil*, Criminal Appeal No. 173 of 1927, decided by Patkar and Baker, JJ., on September 22, 1927 (Unrep. Bom.)

[4] *Varnakote Illath*, (1900) 1 Weir 579.

[5] *Mohamed Ismail Khan* v. *Mahomed Tahir*, (1873) 6 N. W. P. 38; *Taki Husain*, (1884) 7 All. 205, F. B.; *Bishwa Nath Das* v. *Keshab Gandhabanik*, (1902) 7 C. W. N. 74; *Komul Chunder Bose* v. *Nobin Chunder Ghose*, (1868) 10 W. R. 184; *Jaykishen Das v. Sher Singh*, (1910) P. R. No. 10 of 1910; *Burke* v. *Skipp*, (1923) 45 M. L. J. 754, 33 M. L. T. 168; *Nga On Thin*, (1921) 1 B. L. J. 39.

[6] *Bhikhchand*, (1926) 27 Cr. L. J. 1276, 21 S. L. R. 130.

[7] *Taki Husain*, sup. The learned dissenting judgment of Duthoit, J., may be read with great interest.

the resolution to the person in question make it defamation. But it would be [illegible]

publishing an imputation intending to harm or knowing or having reason to believe that it will harm the reputation of the person to whom it is addressed; and a person who sends such notice containing a false imputation is not guilty of defamation[2].

According to the English law, defamatory matter, even if published only to the person defamed, will support an indictment, provided it is likely to provoke a breach of the peace[3]. This view of the English law is met by s 504

It is immaterial whether the person publishing the defamatory statement intended to publish it or not, provided he did so publish it in fact[4]. "Everything printed or written, which reflects on the character of another, and is published without lawful justification or excuse, is a libel, whatever the intention may have been"[5] Defamatory matter written on a post-card[6], or transmitted in a telegram[7], or printed on papers distributed broad-cast,[8] constitutes publication. So are filing in Court a petition containing defamatory matter concerning a person with the intention that it should be read by other persons[9], and swearing of an affidavit containing defamatory words before a Court Commissioner and using it in Courts[10]. Where a person presents a defamatory petition to a superior public officer, who, in the ordinary course of official routine, sends it to some subordinate officer for inquiry, there is a publication of the latter at the place where he may receive it, and a publication for which the original writer may prima facie be held responsible, whether or not he expressly asks for an enquiry[11] Communication to a husband or wife of a charge against the wife or husband is a publication[12], but uttering of a libel by a husband to his wife is not[13]

Where there is a duty which forms the ground of privileged occasion, the person exercising [illegible] doing, and those reasona[illegible] ere that is reasonable [illegible] on behalf of his client, wrote and sent to the plaintiff a letter containing defamatory statements regarding her. The letter was dictated to a clerk in the office and was copied into the letter-book by another clerk In an action against the solicitor [illegible] and usual in [illegible] duty the act [illegible] ation[15] [illegible] calling upon him to pay money lent to him by the complainant wrote a letter to the pleader containing defamatory statements about the complainant. The complainant thereupon charged the accused with defamation. The lower Courts held that the letter having been sent to the complainant's pleader must be considered to have

1 *Nga On Thi*, (1921) 23 Cr. L. J 240

2 *Sadashiv Atmaram*, (1893) 18 Bom 205.

3 *Adams*, (1888) 22 Q B D. 66

4 *Periyasawmi Kotasawmi Tever*, (1886) 1 Weir 580.

5 Per Parke, B, in *O'Brien* v. *Clement* (1846) 15 M & W 435, 437

6 *Sri Vidya Sankara Narasimha Bharathi Guruswamulu*, (1883) 6 Mad 381; *Robinson* v *Jones*, (1879) L. R. 4 Ir 391.

7 *Whitfield* v. *S. E. Ry*, (1858) El Bl. & El. 115

8 *Thiagaraya* v. *Krishnaswami*, (1892) 15 Mad. 214.

9 *Greene* v. *Delanney*, (1870) 14 W R (Cr) 27, *Abdul Hakim* v. *Tej Chandar Mukarji*, (1881) 3 All 815.

10 *Bhikhchand*, (1926) 27 Cr. L. J. 1276, 21 S. L R 130

11 *Raja Shah*, (1889) P. R. No 14 of 1889.

12 *Wenman* v *Ash*, (1853) 13 C. B. 836; *Shoobhagee Koeri* v. *Bokhori Ram*, (1906) 4 C L J 390.

13 *Wennhak* v. *Morgan*, (1888) 20 Q. B. D. 635; *Jaikishen Das* v. *Sher Singh*, (1910) P. R No. 10 of 1910

14 *Boxsius* v. *Goblet Freres*, [1894] 1 Q. B. 842. See to the same effect [illegible] v. *Birch & Co, Ltd.*, [illegible]

15 *Pullman* v [illegible]

been addressed to the complainant himself and therefore there was no publication to a third person. On revision, the former Chief Court of the Punjab held that as the defamatory statements contained in the accused's letter to the complainant's pleader were wholly irrelevant to, and unconnected with, the question of the alleged loan mentioned in the pleader's letter, the pleader must be held to be a third person as far as those statements were concerned, and that therefore there had been publication within the purview of this section[1].

Where a libel is printed, the sale of each copy is a distinct publication, and a fresh offence; and a conviction or acquittal on an indictment for publishing one copy will be no bar to an indictment for publishing another copy[2].

The person who publishes the imputation need not necessarily be the author of the imputation. The person who publishes, and the person who makes, an imputation are alike guilty[3]. It is not necessary that the accused himself must actually utter the words; it is enough if some body else utters the words and the accused by his conduct and by words adopts as his own the words reported by the other[4]. "In considering whether there has been publication of it by him (the person who is not the printer or the first or main publisher of a work which contains a libel, but has only taken a subordinate part in disseminating it), the particular circumstances under which he disseminated the work must be considered. If he did it in the ordinary way of his business, the nature of the business and the way in which it was conducted must be looked at; and, if he succeeds in shewing (1) that he was innocent of any knowledge of the libel contained in the work disseminated by him, (2) that there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel, and (3) that, when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel, then, although the dissemination of the work by him was *prima facie* publication of it, he may nevertheless, on proof of the before-mentioned facts, be held not to have published it"[5]. "An accidental publication is no publication at all"[6].

Repetition.—The Code makes no exception in favour of a second or third publication as compared with the first. If a complaint is properly laid in respect a publication which is prima facie defamatory, the Magistrate is bound to take of the complaint, and deal with it according to law[7]. Repetition of however prevalent, is not an excuse[8].

The doctrine of merger has no place in criminal law, and the circumstance that a person has in the first instance made a defamatory statement out of Court and has afterwards, by repeating such defamatory statement, when examined as a witness in Court, committed the offence of perjury, can be no bar to a prosecution for defamation in respect of the defamatory statement made out of Court[9]. The accused made certain defamatory statements about an officer in a memorial to the Lieutenant-Governor of the United Provinces who ordered an enquiry. The accused was called by two officers, one after another, who were appointed to enquire into the truth of the allegations and repeated the statements. It was held that the conviction of the accused on three separate charges for making and publishing the statement was good[10].

1 *Jaikishen Das* v. *Sher Singh*, (1910) P. R. No. 10 of 1910.

2 *Pandit Mokand Ram*, (1883) P. R. No. 12 of 1883.

3 *Janardhan Damodar Dikshit*, (1894) 19 Bom. 703; *Leandro Mascarenhas*, (1895) Unrep. Cr. C. 769, Cr. R. No. 34 of 1895.

4 *Basina Appanna* v. *Peta Akkanna*, (1924) 20 L. W. 921, 47 M. L. J. 746.

5 Per Romer, L. J., in *Vizetelly* v. *Mudie's Select Library Ltd.*, [1900] 2 Q. B. 170, 180.

6 Per Wills, J., in *Munslow*, [1895] 1 Q. B. 758, 765; *Emmens* v. *Pottle*, (1885) 16 Q. B. D. 354.

7 *Howard*, (1887) 12 Bom. 167.

8 *Waithman* v. *Weaver*, (1822) 11 Price 257n.

9 *Periyasawmi Kolasawmi Tever*, (1886) 1 Weir 580.

10 *Jai Debi*, (1915) 13 A. L. J. 681

Publication of defamatory matter in a newspaper.—The publisher of a newspaper is responsible for defamatory matter published in such paper whether he knows the contents of such paper or not[1]. It would be a sufficient answer to a charge of defamation against the editor of a newspaper if he proved that the libel was published in his absence and without his knowledge, and that he had in good faith entrusted the temporary management of the paper during his absence

whether the libel was inserted with or without his knowledge Statute 6 & 7 Vic, c. 96, was, therefore, passed to mitigate the rigour of the common law, and to give the proprietor the benefit of the presumption that when one person employs another to do a lawful act, he is to be taken to authorize him to do it in a lawful and not in an unlawful manner, and that the statute declared for the purpose that it was competent to the proprietor to prove that the libel was published without his authority, consent or knowledge, and that the publication did not arise from want of due care or caution on his part[4]

The publication of a notice in a newspaper conveying an imputation that the complainant is dishonest in the management of the affairs of a company and tries to conceal the dishonesty by methods that are themselves dishonest, is defamation[5].

The sending of a newspaper containing defamatory matter by post from Calcutta, where it is published, addressed to a subscriber at Allahabad, is publication of such defamatory matter at Allahabad[6] To prove the publication of libel through newspaper it is sufficient to prove that the newspaper was delivered within the postal area over which the Court had jurisdiction and it is not necessary to go further and show that the article was read by some particular person since a newspaper is a commodity printed for the purpose of being read and it must be assumed that it was so read[7].

No privilege attaches to the profession of the press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute law, his privilege is no other and no higher[8].

'Imputation concerning any person'.—An imputation ordinarily implies an accusation, or something more than an expression of a suspicion It is, however, rather difficult to draw the line An expression of a suspicion may have the same effect on the mind of the person to whom the suspicion is communicated as an accusation would have[9]. Where the accused made a report at the police-station that some property of his had been stolen from his threshing floor, and that he suspected the complainant and two others, and the complainant prosecuted the accused for defamation in respect of that report, it was held that an expression of suspicion might have the same effect on the mind of the person to whom the suspicion was communicated as an accusation would have, and as in this case the suspicion resulted in the police searching complainant's house, the accused was guilty of defamation[10]

[1] *McLeod*, (1880) 3 All 342

[2] *Ramasami v. Lokanada*, (1886) 9 Mad. 387, *Pundit Mohand Ram*, (1883) P. R. No 12 of 1883

[3] *Har Swarup v. Muhammad Siraj*, (1928) 50 All 806.

[4] *Holbrook*, (1878) 4 Q. B D 42

[5] *Madhorav v Narayan*, (1926) 27 Cr L J. 1119

[6] *McLeod*, sup *Girjashankar Kashiram*, (1890) 15 Bom. 286; *Bal Gangadhar Tilak*, (1897) 22 Bom. 112, 129; *Kelly Doss Mitter*, (1866) 5 W. R. (Cr.) 44.

[7] *Jhabbar Mal*, (1927) 26 A. L. J. 196.

[8] *Channing Arnold*, (1914) 41 I. A 149, 16 Bom. L. R. 544.

[9] *Thandu*, (1927) 8 L. L. J. 97, 27 P. L. R. 171.

[10] *Ibid.*

The words complained of must contain an imputation concerning some particular person or persons whose identity can be established. If the words complained of contain no reflection upon a particular individual or individuals, but may equally apply to others although belonging to the same class an action will not lie.. Where the accused published in his paper an account of an outrage on a woman alleged to have been perpetrated by two constables within the jurisdiction of the Begunia *thana*, in which four constables were stationed, it was held that, in the absence of proof that it was intended to charge any particular and identifiable constables with the alleged offence, the accused was not guilty of defamation[1].

A newspaper is not a person, and therefore, it is not a criminal offence to defame a newspaper. Defamation of a newspaper may in certain cases involve defamation of those responsible for its publication. It might, for instance, amount to defamation of the person responsible for a newspaper to say that its policy was influenced or dictated by a particular person, if that person was disreputable[2].

It is immaterial whether the libel imputes crime, &c., to the prosecutor, in a direct manner, or indirectly, by such hints or modes of expression as are likely to convey the intended meaning to the person to whom the libel was published. And the same where the imputation is conveyed obliquely, or indirectly, or by way of question, conjecture, or exclamation, or by irony[3], or by feigned names[4]. An imputation, even if it be true, is not by itself good ground for making it[5].

The words "a coward, dishonest man, and something worse than either"[6], or the words to the effect that the complainant and others were preparing to bring false charges against the accused[7], or words imputing insolvency against a person in the way of his trade[8] are held to be defamatory. It is not open to one member of a caste to call another an outcaste. Words which impute unworthiness to remain a member of the caste are defamatory[9].

It may amount to defamation to impute anything to a deceased person if the imputation would harm the reputation of that person if living, and is hurtful to the feelings of his family (Expln. 1); or to make an imputation concerning a company or an association or collection of persons as such (Expln. 2). Ironical expressions may amount to defamation (Expln. 3).

Imputation against a dead person.—It has been held, with regard to libels on the memory of persons deceased, that a writing reflecting on the memory of a dead person, not alleged to be published with a design to bring a scandal or contempt on the family of the deceased, is not punishable as a libel. (See Explanation 1). "Now to say, in general, that the conduct of a dead person can at no time be canvassed: to hold that, even after ages are passed, the conduct of bad men cannot be contrasted with the good, would be to exclude the most useful part of history. And therefore it must be allowed that such publications may be made fairly and honestly. But let this be done whenever it may, whether soon or late after the death of the party, if it be done with a malevolent purpose, to vilify the memory of the deceased and with a view to injure his posterity,...then it becomes illegal"[10].

Where the defamation consists in imputing matters concerning a deceased person, "the essence of the offence of defamation consists in its tendency to cause that description of pain which is felt by a person who knows himself to be the object of the

1 *Government Advocate, Bihar* v. *Gopi Bandhu Das*, (1922) 1 Pat. 411; *Pratap Chandra Guha Roy*, (1925) 29 C. W. N. 904, 12 C. L. J. 178.

2 *[illegible]*, (1925) 4 Ran. 462.

3 See for authorities Archbold, 26th Edn., p. 1247.

4 *William Taylor*, (1869) 24 C. L. J. 345.

5 *[illegible]* v. *[illegible]*, (1882) 5 C. P. L. R. (Cr.) 55.

6 *[illegible]*, (1877) 9 All. 123.

7 *Shiva Prasad Pandit*, (1878) 4 Cal. 124.

8 *Bhaishankar*, (1926) 27 Cr. L. J. 1276, 21 S. L. R. 150; *Edwards* v. *Marshall*, (1845) 7 Q. B. 918.

9 *[illegible] Chetty* v. *[illegible] Chetty*, (1896) 21 Mad. 67. See *[illegible]* v. *[illegible]*, (1914) 17 M. L. T. 304.

10 Per Lord Kenyon in *Topham*, (1791) 4 T. R. 126, 129. See *Labouchere*, (1884) 12 Q. B. D. 320.

unfavourable sentiments of his fellow-creatures, and those inconveniences to which a person who is the object of such unfavourable sentiments is exposed"[1].

A prosecution may be maintained for defamation of a deceased person, but no suit for damage will lie in such a case Where, therefore, a suit was brought by the heir and nearest relation of a deceased person for defamatory words spoken of such deceased person, and alleged to have caused damage to the plaintiff as a member of the same family, it was held that the suit was not maintainable[2].

Imputation gainst a combination of persons.—"Explanation 2 includes a company or an association or collection of persons as such within the word 'person' as used in the definition, so that the latter should not be limited to individuals"[3]. Explanation 2 which finds a parallel in the English law gives a legal remedy to a combination of persons, when, by defamation of that combination, many individual persons might be injured[4].

It has been held in a series of cases that an action of libel will lie at the suit of an incorporated trading company in respect of a libel calculated to injure its reputation in the way of its business[5] The words complained of must attack the corporation or company in the method of conducting its affairs, must accuse it of fraud or mismanagement, or must attack its financial position[6]

In a case in which the explanation is properly called into use the identity of the company or association or collection of persons must be maintained throughout with reference to the imputation said to have been made concerning them as such with the intention of harming their reputation so that thereby they are defamed. An imputation concerning a company or association of persons as such cannot by virtue of this explanation justify a charge of defaming an individual and a charge cannot combine the explanation with the definition for such a purpose[7] It is doubtful if the police force at a particular place is such an association or collection of persons as is contemplated in Explanation 2[8].

Where a collection of persons is defamed, the defamatory words must apply to all the class. The libel need not name the class as such, it is sufficient if the words can only be interpreted in such a way as to reflect on all the members of that class[9]. "If a person wrote that all lawyers were thieves no particular lawyer could sue [illegible]
a w[illegible]
as [illegible]
and [illegible]
ner [illegible]
Str[illegible]
cular individual or collection of individuals as such". Where a defamatory matter appears [illegible]
capable [illegible]
of that [illegible]

Ironical expression.—Explanation III which finds a corresponding parallel in the English law makes ironical expressions, if defamatory, punishable Where

[1] Note R, p. 175, quoted in *Parwari*, (1919) 41 All 311, 314.

[2] *Luckumsey Rowji* v *Hurban Nursey*, (1881) 5 Bom 580

[3] Per Buckland, J., in *Protap Chandra Guha Roy*, (1925) 29 C. W. N. 904, 42 C. L. J 178

[4] See *Williams*, (1822) 5 B. & Ald. 595.

[5] *South Hetton Coal Co., Ltd* v *N. E. News Association*, [1894] 1 Q B 133

[6] Per Lord Esher, M. R., in *ibid*, p. 141

[7] *Protap Chandra Guha Roy*, sup.

[8] *Ibid*.

[9] See *Mohin Chandra Roy* v *A. H. Watson*, (1928) 55 Cal 1280.

[10] Per Willes, J., in *Eastwood* v. *Holmes*, (1858) 1 F. & F. 347, 349; *Osborn*, (1732) 2 Barnard (K B.) 138, 166

[11] *Alme & Nott*, (1699) 3 Salk 224

[12] *Gathercole*, (1838) 2 Lew. 237

[13] [illegible]

Gopa

it has been sarcastically said of a lawyer, with intent to convey an entirely opposite idea as that "he is an *honest* lawyer", this explanation will apply.

Imputation concerning a caste.—The accused, who were members of the Reddi caste, convened a meeting of their caste in the village and stated at such meeting to the members of the caste that the members of another caste in the village, viz., the Balijas, were inferior to their caste, that they (the Reddies) should have no intercourse with the Balijas, and that the village servants should not serve the latter. The village servants consequently refused to serve the Balijas, and the Reddies abstained from associating with them. It was held that the acts of the accused did not amount to such an imputation on the complainant, who was a member of the Balija caste, as would warrant a conviction for defamation. The Court said: "No conduct affecting the complainant's status as a member of the Balija caste or involving in it a transgression of the rules of his caste and tending to lower his reputation as a Balija among his castemen or the general public, appears to have been imputed"[1].

2. 'Words either spoken or intended to be read, or by signs or by visible representations'.—An essential difference between the Indian and the English law is that the former recognizes 'words spoken' as a mode of defamation, and the latter does not. By the English law, defamation is a crime only when it is committed by writing, printing, engraving or some similar process. Spoken words reflecting on the private character, however atrocious may be the imputation which these words convey, however numerous may be the assembly before which such words are uttered, furnish ground only for a civil action. Under the English law "no indictment will lie for words spoken and not reduced into writing... unless they are seditious, blasphemous, grossly immoral or obscene, or uttered to a magistrate in the execution of his office, or uttered as a challenge to fight a duel, or with an intention to provoke the other party to send a challenge"[2]. The Penal Code makes no distinction between written and spoken defamation[3]. In it the term 'defamation' is used to embrace both libel and slander. The authors of the Code say: "Herein the English law is scarcely consistent with itself. For if defamation be punished on account of its tendency to cause breach of the peace, spoken defamation ought to be punished even more severely than written defamation, as having that tendency in a higher degree. A person who reads in a pamphlet a calumnious reflection on himself, or on some one for whom he is interested, is less likely to take a violent revenge than a person who hears the same calumnious reflection uttered. Public men who have, by long habit, become callous to slander and abuse in a printed form, often show acute sensibility to imputations thrown on them to their faces. Indeed, defamatory words, spoken in the presence of the person who is the object of them, necessarily have more of the character of a personal affront, and are, therefore, more likely to cause breach of the peace than any printed libel.

"The distinction which the English criminal law makes between written and spoken defamation is generally defended on the ground that written defamation is likely to be more widely spread and to be more permanent than spoken defamation. These considerations do not appear to us to be entitled to much weight. In the first place, it is by no means necessarily the fact that written defamation is more extensively circulated than spoken defamation. Written defamation may be contained in a letter intended for a single eye. Spoken defamation may be heard by an assembly of many thousands. It seems to us most unreasonable that it should be penal to say, in a private letter, that a man is dissipated, and not penal to stand up at the town hall, and there, before the whole society of Calcutta, falsely to accuse him of poisoning his father.

1 [illegible] (1896) 1 Weir 575.
2 See Archbold, [illegible], p. 1215.
3 [illegible]; Mohant Parmanand Das, (1895) 2 W. R. (Cr.) 56.

"In the second place, it is not necessarily the fact that the harm caused by defamation is proportioned to the extent to which the defamation is circulated. Some slanders,—and those slanders of a most malignant kind,—can produce harm only while confined to a very small circle, and would be at once refuted if they were published. A malignant whisper addressed to a single hearer, and meant to go no further, may indicate greater [illegible]
may deserve more severe punishmei [illegible]
editions A person, for example, w [illegible]
the mind of a husband suspicions of the fidelity of a virtuous wife, might be a defamer of a far worse description than one who should insert the lady's name in a printed lampoon.

"It must be allowed that, in general, a printed story is likely to live longer than a story which is only circulated in conversation But, on the other hand, it is far easier for a calumniated person to clear his character, either by argument or by legal proceedings, from a charge fixed in a printed form, than from a shifting rumour, which nobody repeats exactly as he heard it In general, we believe, a man would rather see in a newspaper a story discreditable to him which he had the means of refuting, than know that such a story, though not published, was current in society"[1].

'Intended to be read'.—"Where the words containing the imputation are in writing, it is necessary,...that the maker of the imputation shall intend that the words shall be read, that is, read by some other person than the person defamed, or, in other words, that they shall be made public, for the essence of the offence is the intention to harm reputation, and that necessarily requires publicity to be given to the imputation"[2].

'By signs or by visible representations'.—This is a class of defamation likely to do as much mischief as any written production, and it has always been considered by the English law to be a serious offence Anything published of a man which renders him ridiculous or contemptible, is as much a libel as serious charges are, and very often has a wider effect The words 'visible representations' will include every possible form of defamation which ingenuity can devise "For instance, a statue, a caricature, an effigy, chalk marks on a wall, signs or pictures may constitute a libel"[3].

3. 'Intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person'.—It is not necessary to prove that the complainant actually suffered directly or indirectly from the scandalous imputation alleged, it is sufficient to show that the accused intended to harm, or knew, or had reason to believe, that the imputation made by him would harm the reputation of the complainant[4], irrespective of whether harm is actually caused or not[5]. It is not necessary that there should be an intention to harm the reputation, it is sufficient if there was reason to believe that the imputation made *would harm the reputation*[6]

An imputation against another person, although made in the absence of actual ill-[illegible] Con-
scious vio [illegible] no
malice in [illegible] a
street quarrel and were mere vulgar abuse, it was held that in the circumstances there was no deliberate intention to harm the reputation of the person defamed[8]

[1] Note R, pp. 176, 177

[2] Per Oldfield, J, in *Taki Husain*, (1884) 7 All 205, 222, F B

[3] Per Lopes, L J, in *Monson* v *Tussauds, Limited*, [1894] 1 Q B 671, 692.

[4] *Thakur Dass*, (1874) 6 N W P. 86, *Gobinda Pershad Pandey* v. *Garth*, (1900) 28 Cal 63; (1883) 1 Weir 575, *Madanji*, (1910) 12 Cr L J 129, *Alex Pimento*, (1920) 22 Bom L R 1224, 5 Bom. Cr C 257

[5] *Ram Narain*, (1924) 26 Cr L J. 25, 22 A. L J 639, *Bhikhchand*, (1926) 27 Cr L. J. 868, 21 S. L. R. 130.

[6] *Kewala Nandgir*, (1913) P W. R (Cr), No. 34 of 1913

[7] *Palani Asari*, (1882) 1 Weir 613

[8] *Anthony Rodgers*, [illegible]

'Harm the reputation'.—"The meaning which should be attached to 'harm' is not the ordinary sense in which the word is used,...by 'harm' is meant imputations on a man's character made and expressed *to others*, so as to lower him in their estimation, and that anything which lowers him merely in *his own* estimation certainly does not constitute defamation"[1]. A person who commits defamation is not to be excused from the penalties attached to the offence merely because he has comported himself in respect of the mode of giving expression to the defamatory matter in such a way that little real injury results from the offence[2]. The word 'harm' is used in the definition of 'injury' (s. 44).

A man's reputation is his property, and if possible of more value than other property. But a man's opinion of himself cannot be called his 'reputation'[3]. A man has no 'reputation' to himself and therefore communication of defamatory matter to the person defamed is no publication. It is no defence to say that the reputation of the complainant is so good or that of the accused is so bad that serious injury to the reputation was not in fact caused[4].

The use of common abuses cannot be regarded as conveying any such imputation as can in any way harm the reputation of the person towards whom it is used and it therefore does not constitute this offence[5]. But if obscene and insulting words are used regarding any person after an altercation with him is over, the person using such words would be guilty of defamation[6].

Explanation 4 specifies the various ways in which the reputation of a person may be harmed. It says that the imputation must directly or indirectly lower the moral or intellectual character of the person defamed. "The words '*directly* or *indirectly*'...mean that the person defamed must either be abused in express terms, or the wording of the communication must convey such imputations as any person reading it must understand to impute misconduct or bad character. The words cannot...be understood to mean that the person libelled should himself be the direct means of publishing the libel to others"[7]. This explanation does not apply where the words used, and forming the basis for a charge, are *per se* defamatory; though when the meaning of words spoken or written is doubtful, and evidence is necessary to determine the effect of such words and whether they are calculated to harm a particular person's reputation, it is possible that the principle enunciated in the explanation might and would with propriety be applied[8]. The complainant, one Scott, was a Chairman of a Municipal Board. At a meeting of the Board, which was presided over by the complainant, a resolution was passed calling on the accused to pay certain taxes due by her to the Municipality and was signed by the complainant. A copy of the resolution, signed by the Secretary, was sent to the accused, who returned it after writing upon it the words, Mrs. McCarthy will take no notice of anything written by H. G. Scott, he already having shown himself a coward, dishonest man, and something worse than either". It was held that the accused was guilty of defamation. The Court said; "In this case there is no question as to the significance or meaning of the words written. They are distinctly defamatory within the meaning of s. 499, and, as such, whether they were written in haste or in anger, the respondent is clearly responsible"[9]. The wording of this explanation is very loose. Anything calculated to lower the reputation of a person may come under this provision. Thus, an accusation of anonymous letter-writing may amount to defamation[10]. An imputation that a

[1] Per Mahmood, J., in *Tuki Husain*, (1884) 7 All. 205, 221, F.B.

[2] *[illegible]*, (1884) 1 Weir 591.

[3] Per Mahmood, J., in *Tuki Husain*, (1884) 7 All. 205, 221, F.B.

[4] *Emp. v. [illegible]*, (1924) 25 Cr. L. J. 23.

[5] *[illegible]*, (188[illegible]) 3 A. W. N. 35; *[illegible]*, (1884) 3 A. W. N. 167.

[6] *Raja Ram Singh*, (1915) 16 A. L. J. 494; *Inayat Shah*, (1924) 25 Cr. L. J. 4.

[7] Per Mahmood, J., in *Tuki Husain*, (1884) 7 All. 205, 221, F.B.

[8] *McCarthy*, (1887) 9 All. 420; *[illegible] v. Emp.*, (1928) 26 A. L. J. [illegible]

[9] *McCarthy*, (1887) 9 All. 420, 42[illegible].

[10] (1872) 7 Mad. Jur. 253.

Mahomedan had killed a cow in his compound is not one which can be said to harm his reputation[1]. In reply to a book written by the complainant attacking Vaishnavism and its founders, the accused retorted by a similar publication and both books dealt with highly controversial religious matters Very violent language was used in the latter about the complainant. It was held that it did not amount to defamation, as the personal character or respectability of the complainant was not in any way assailed[2]. Where the complainant was invited by the accused to a feast at the latter's house along with a large number of other people and when he sat down to dinner he was asked by the accused to leave the place without giving any reason or making any imputation whatever, it was held that as there was no imputation calculated to harm the reputation of the complainant the charge of defamation could not be established[3]. But where a Hindu lodged a complaint of defamation alleging that at the time of the feast of the brotherhood the accused declared that he had been outcasted and was not fit to sit down at the feast and proved that the allegation was false and had operated to his prejudice, it was held that the accused was guilty of defamation[4] Where the accused referred to the complainant, who was *Parsutia Kaith* as a *Kori Chamar* with the result that none of the priests attended the religious ceremony which had to be performed at the complainant's house, it was held that the accused were guilty of defamation[5]. Where a complainant was described as a man with whom not even Turks, let alone Brahmins, could associate and the wedding of his daughter was characterised as a sinful carnival worthy of pe [illegible]
and degeneration—it was he [illegible]
of the writer being to hold [illegible]

It is not defamation for a number of persons to meet and resolve for good reasons not to associate with a particular person. But they should not publish the resolution[7].

Exceptions.—There are occasions when a man is allowed to speak out or write matters about others which would ordinarily be defamatory. These occasions [illegible]

3 Conduct of any person touching any public question.

4. Publication of reports of proceedings of Courts.

5. Merits of a case decided in Court or conduct of witnesses and others concerned.

6. Merits of a public performance.

7. Censure passed in good faith by a person having lawful authority over another.

8 Accusation preferred in good faith to an authorised person

9. Imputation made in good faith by a person for the protection of his or other's interests.

10 Caution intended for the good of the person to whom it is conveyed or for public good

Unlike a civil suit, in which the Court is confined more or less to the pleadings, in a criminal case, before a conviction is recorded, it has always to be seen whether the proved or admitted facts bring the case within an exception, which takes it out of the offence defined, the burden of proving such facts being on the accused[8].

1 *Sikandarkhan* v. *Jummu*, (1882) 5 C. P. L. R (Cr.) 53.

2 [illegible] *Krishna*- [illegible] 364,

[illegible] A. L. J. 361.

[illegible]

Exception 1.—This and exception 4 require that the imputation should be true and be for public good. The remaining exceptions require that the imputation should be made in good faith. "For", say the authors of the Code, "to require in these cases that the imputation should be true, would be to render these exceptions mere nullities. Whether a public functionary is or is not fit for his situation; whether a person who has bestirred himself to get up a petition in favour of a public measure ought to be considered as an enlightened and public-spirited citizen, or as a foolish meddler; whether a person who has been tried for an offence was or was not guilty; which of two witnesses who contradicted each other on a trial ought to be believed; whether a portrait is (life) like; whether a song has been well sung; whether a book is well written:- these are questions about which honest and discerning men may hold opinions diametrically opposite; and to require a man to prove to the satisfaction of a Court of law that the opinion which he has expressed on such a question is a right opinion is to prohibit all discussion on such questions. The same may be said of those private communications which we propose to allow. It is plainly desirable that a merchant should disclose to his partners his unfavourable opinion of the honesty of a person with whom the firm has dealings. It is desirable that a father should caution his son against marrying a woman of bad character. But if the merchant is permitted to say to his partners, if the father is permitted to say to his son, only what can be legally proved before a Court, it is evident that the permission is worth nothing"[1].

'Public good'. Public good is the good of the general public as contra-distinguished from that of an individual[2]. The truth of the imputation complained of shall amount to a defence if it was for the public benefit that the imputation should be published but not otherwise. The authors of the Code observe: "A person who has been guilty of gross acts of swindling at the Cape comes to Calcutta, and proposes to set up a house of agency. A person who has been forced to fly from England on account of his infamous vices repairs to India, opens a school, and exerts himself to obtain pupils. A captain of a ship induces natives to emigrate, by promising to convey them to a country where they will have large wages and little work. He takes them to a foreign colony, where they are treated like slaves, and returns to India to hold out similar temptations to others. A man introduces a common prostitute as his wife into the society of all the most respectable ladies of the presidency. A person in a high station is in the habit of encouraging ruinous play among young servants of the Company. In all these cases, and in many others which might be named, we conceive that a writer who publishes the truth renders a great service to the public, and cannot, without a violation of every sound principle, be treated as a criminal.

"There are undoubtedly many cases in which the spreading of true reports, prejudicial to the character of an individual, would hurt the feelings of that individual, without producing compensating advantage in any other quarter. The proclaiming to the world that a man keeps a mistress, that he is too much addicted to wine, that he is penurious in his house-keeping, that he is slovenly in his person; the raking up of ridiculous and degrading stories about the youthful indiscretions of a man who has long lived irreproachably as a husband and a father, and who has attained some post which requires gravity and even sanctity of character, can seldom or never produce any good to the public sufficient to compensate for the pain given to the person attacked, and to those who are connected with him"[3].

The onus of proving the statement or at least of showing that he had reasonable ground for believing it to be true, and was actuated in making such statement not by malicious motives, but by an intelligent zeal for the public interest, lies on the person making the statement[4].

1 Note B, pp. 183, 184.
2 [illegible], (1910) 12 Cr. L. J. [illegible].
3 Note B, pp. 178, 179.
4 *Altaf Hossein* v. *Tasaddak Hossein*, (1907) 2 A.L.J. 87; *Jafar* [illegible], (1916) 18 [illegible] L. J. [illegible].

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that the particular publication is not for the public good, and is, therefore, not privileged[2]. A privilege does not justify publication in excess of the purpose or object which gives rise to it[3]. An editor of a newspaper does not act in good faith and for the 'public good', when he publishes every foul rumour, however ill-founded and however much pain it may give to those concerned, which comes to his ears, and he states that he does not vouch for the truth of the rumour. The discharge of journalistic duties does not justify the publication of all cases of rumours, injustice, and oppression, which may have the effect of seriously injuring the reputation of others, without the least inquiry into its truth[4]

Cases.—Imputation truth which public good requires to be made.—C was put out of caste by a *panchayat* of his caste-fellows on the ground that there was an improper intimacy between him and a woman of his caste Certain persons, members of the *panchayat*, circulated a letter to the members of their caste generally, in which, stating that C and such woman had been put out of caste, and the reason for the same, and requesting the members of the caste not to receive them into their houses or to eat with them, they made certain statements, applying equally to C or such woman. Such statements were defamatory It was held that, if such persons were careless enough to use language which was applicable to C, they did so at their peril and they could not escape the responsibility of having defamed C by saying that they intended such language to apply to such woman, that had such persons contented themselves with announcing the determination of the *panchayat*, and the grounds upon which such determination was based, they would have been protected; but inasmuch as they did not so content themselves, but went further and made false and uncalled for statements regarding C, they had not acted in good faith[5]. The denouncing of a Brahmin for providing alcoholic refreshment at a wedding reception for those of his guests who desired to partake of such beverages is not for the "public good"[6].

In discussing the claims of a councillor for a Municipal office, a person is entitled to make remarks in the interests of the public, so long as he abstains from aspersing the private character of the former[7].

Exception. 2.—"Every subject has a right to comment on those acts of

is for the public good, he is not liable to an action if the comments are made honestly, and he honestly believes the facts to be as he states them, and there is no wilful misrepresentation of fact or any misstatement which he must have known to be a misstatement if he had exercised ordinary care"[8].

1 *Ramanand*, (1881) 3 All. 664.

2 *Janardhan Damodhar Dikshit*, (1894) 19 Bom. 703; *Leandro Mascarenhas*, (1895) Unrep. Cr C 769; *Gopalrao* v. *Mt Pari Bi*, (1882) 5 C. P L. R (Cr) 55

3 *Sri Vidya Sankara Narasimha Bharathi* v. *Guruswamulu*, (1883) 6 Mad 381, 395

4 *Government Advocate, Bihar* v. *Gopabandhu Das*, (1922) 1 Pat. 414, 420; *Purna Chandra Ghose*, (1924) 28 C W. N. 579.

If a person undertake to criticise the acts of a public man, he must take care not to assert that which is not true as the basis of his criticism and he is bound not to conceal wilfully anything which would show that the criticism is not well-founded[1]. The opinion expressed must be expressed in good faith and must not contain only the half truth. The accused, an editor of a newspaper, published an article in which the following passage, admittedly referring to the complainant, occurred:—"Has his (the complainant's) character been inquired into? Does no one remember that this very man was sent by the Subordinate Judge of Sholapur to be prosecuted? Are not the proceedigs instituted by the Subordinate Judge to be found on the record?" The Magistrate found that it was literally true that the complainant had been sent to be prosecuted, but that it was also true that the prosecution had, to the accused's knowledge, been ordered to be withdrawn by the District Judge. It was held that although the statement contained only the truth, it was incomplete and misleading; and that, as the accused was well aware that the prosecution referred to had been withdrawn, and did not injuriously affect the complainant's character, he could not plead that the imputation made by him on the complainant's character was made in good faith, or for the public good[2].

In dealing with the question of good faith, the proper point to be decided is not whether the allegations put forward by the accused in support of the defamation are in substance true, but whether he was informed, and had good reason, after due care and attention, to believe that such allegations were true[3].

The expression 'opinions in good faith' means that in order to express an opinion in good faith the person who holds it must have taken care and attention in forming it[4].

The mere absence of ill-will does not of itself prove that the imputation was made in good faith[5].

As to 'public servant', see s. 21, *supra*.

Newspaper criticism.—A newspaper has a public duty to ventilate abuses and if an official fails in his duty, a newspaper is absolutely within its rights in publishing facts derogatory to such official and making fair comment on them, but it must get hold of provable facts[6]. The editor, however, should be most watchful not to publish defamatory attacks upon individuals unless he first takes reasonable pains to ascertain that there are strong and cogent grounds for believing the information which is sent to him to be true—that proof is readily available and that in the particular circumstances his duty to the public requires him to make the facts known[7].

Exception 3.—The authors of the Code say: "There are public men who are not public functionaries; persons who hold no office may yet...take a very active part in urging or opposing the adoption of measures in which the community is deeply interested. It appears clear to us that every person ought to be allowed to comment, in good faith, on the [illegible] these volunteer servants of the public, with the same freedom with [illegible] to comment on the proceedings of the official servants of the public[8]". The comment must be such that a fair mind would use under the circumstances, and it must not misstate facts, because a comment cannot be fair which is built upon facts, which are not truly stated, and further, it must not convey imputations of an evil sort, except so far as the facts truly stated warrant the imputation[9]. A fair comment must be based upon facts and a writer is not entitled to invent facts and express his opinions upon such

1 *William Tayler*, (1896) 26 C. L. J. 345.
2 *Kakde*, (1880) 4 Bom. 298.
3 *Shibo Prosad Pandah*, (1878) 4 Cal. 124. See s. 52.
4 *Banks*, (1869) 26 C. L. J. 401.
5 *Palani Asari*, (1882) 1 Weir 613.
6 *Jhabbar Mal*, (1927) 26 A. L. J. 196.
7 *Mohammad Nazir*, (1928) 26 A. L. J. 509.
8 Note R, pp. 182, 183.
9 *Joynt* v. *Cycle Trade Publishing Co.*, [1904] 2 K. B. 292, 294.

invented facts. Nor can the conduct of a public man or of a person in his public character be assailed as dishonest simply because the writer fancies such conduct is open to suspicion[1].

In *Campbell* v. *Spottiswoode*[2] Cockburn, C.J., said: "It seems to me that a line must be drawn between hostile criticism on a man's public conduct and the motives by which that conduct may be supposed to be influenced; and that you have no right to impute to a man in his conduct as a citizen,—even although it be open to ridicule or disapprobation,—base, sordid, dishonest, and wicked motives, unless there is so much ground for the imputation that a jury shall be of opinion, not only that you may have honestly entertained some mistaken belief upon the subject, but that your belief is well founded and not without cause... It has been said in argument that it is for the interest of society that a man's public conduct shall be criticised without any limit, except that which it is admitted on all hands must be imposed—namely, that the writer must only write according to what he thinks just and true But, it seems to me that the public at large have an equal interest in the maintenance of public character, without which public affairs could never be conducted with a view to the welfare and the best interests of our country; and I think that we ought not to sanction attacks upon public men, which if allowed would be destructive of their character and honour, unless such attacks are well founded Where the public conduct of a public man is made the subject of observation, and the writer who is commenting upon it makes imputations of motives which fairly and properly and legitimately arise out of the conduct itself, and the jury shall be of opinion, not only that the criticism was honest, but also well founded, there I should be prepared to say that the imputation so made would not be the subject of an action But I do not think we should be [illegible] what has always been understood to be essential [illegible] cause a writer may [illegible] of dishonesty, that [illegible]

Case.—Conduct of a person touching a public question.—Where M, a medical man and the editor of a medical journal, said in such journal of an advertisement, published by H, another medical man, in which H solicited the public to subscribe [illegible] We are not surprised to find that the line he has elected to adopt has not met with [illegible] the same province and we have no [illegible] fessional". It was [illegible] king such hospital a "public question" and of submitting it to the "judgment of the public", and M had expressed himself in good faith, M was within the third, sixth and ninth exceptions[3]. Where the accused published a letter in a newspaper purporting to be a verbatim account of what had transpired at a meeting of the Municipal Corporation, which was admittedly true in substance, it was held that the accused was protected under this exception[4].

Exception 4.—"Where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open Court, then the publication, without malice, of a fair and accurate report of what takes place before

[1] *Appa* v. *Marcar*, (1917) 19 Cr L. J 129; *Bhagwan Das*, (1926) 27 Cr. L J 1361.

[2] (1863) 32 L J. Q. B. 185, 199, 200, 3 B & S 769, 776, 777.

[3] *McLeod*, (1880) 3 All 342 See *Subroya Iyer* v *Moulvi Kadar* [illegible] *Abdul Kadar*, [1914] M. W. N. [illegible]

[4] *Murlidhar* v. [illegible] [illegible]14) S S. L. R. 143.

that tribunal is privileged"[1]. If the proceedings are such as will result in a final decision being given, a fair and accurate report may be published before the final decision is given[2]. Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of Justice should be universally known. The general advantage to the country in having these proceedings made public, more than counter-balances the inconveniences to the private persons whose conduct may be the subject of such proceedings[3]. It is immaterial whether the proceedings were *ex parte* or not[4], or whether the Court had jurisdiction or not[5]. But a report of judicial proceedings cannot be published if a Court has prohibited the publication of any such proceedings[6], or where the subject matter of the trial is obscene[7] or blasphemous[8]. In England there is an Act to regulate the publication of reports of judicial proceedings in such manner as to prevent injury to public morals[9].

The privilege of publishing reports of judicial proceedings is not confined to newspapers only. There is no difference between the privilege of a newspaper and of a pamphlet. The privilege is the same as a matter of law for newspapers as for private individuals. In both cases a fair report of the trial is all that is necessary[10]. A newspaper has not greater privilege in such a matter than any ordinary person—any person is privileged in publishing such a report if he does so merely to inform the public[11].

The reporter, however, who gives the account of judicial proceedings ought not to mix up with it comments of his own; and if any comments are made, they should not be made as a part of the report. The report should be confined to what takes place in Court and the two things, report and comment, should be kept separate[12]. The report must not be one-sided or highly coloured[13].

As to the definition of 'Court of Justice' see *s.* 29, *supra.*

Case.—Publication of the proceedings of Courts of Justice.—An accused person, who was the trustee of a temple, was convicted of defamation, the alleged defamatory statement being that the complainant, who performed the worship in a temple, had been convicted and sent to jail for the theft of idols belonging to the temple. At the time when the statement was made, an appointment was in question in connection with the temple. It was held that the accused was justified in making the statement either in the interest of the temple, or because the statement was no more than a publication of the result of proceedings in a Court of Justice[14].

Exception 5.—The authors of the Code say: "We have allowed all persons freely to discuss in good faith the proceedings of courts of law, and the characters of parties, agents and witnesses as connected with those proceedings. It is almost universally acknowledged that the courts of law ought to be thrown open to the public; but the advantage of throwing them open to the public will be small indeed, if the few who are able to press their way into a court are forbidden to report what has passed there to the vast numbers who were absent, or if those who are allowed to know what has passed are not allowed to comment on what has passed"[15].

1 Per Lord Esher, M. R., in *Kimber* v. *The Press Association.* [1893] 1 Q. B. 65, 68.
2 *Kimber* v. *The Press Association,* [1893] 1 Q. B. 65, 71.
3 Per Lawrence, J., in *Wright,* (1799) 8 T. R. 293, 298.
4 *Kimber* v. *The Press Association,* sup.
5 *Usill* v. *Hales,* (1878) 3 C. P. D. 319.
6 *Clement,* (1821) 4 B. & Ald. 218.
7 *Hicklin,* (1888) L. R. 3 Q. B. 360; *Steele* v. *Brannan,* (1872) L. R. 7 C. P. 261; "*Evening News,*" (1886) 3 T. L. R. 255.
8 *Mary Carlile,* (1819) 3 B. & Ald. 167.
9 16 & 17 Geo. 5, c. 61.
10 *Milissich* v. *Lloyds,* (1877) 13 Cox 575.
11 *Salmon* v. *Isaac,* (1869) 20 L. T. 885, 886.
12 *Andrews* v. *Chapman,* (1853) 3 C. & K. 286; *William Fleet,* (1818) 1 B. & Ald. 379.
13 *Stiles* v. *Nokes,* (1806) 7 East 493, 497.
14 *Singaraju Nagabhushanam,* (1902) 26 Mad. 464.
15 Note R., p. 183.

"The administration of justice is matter of universal interest to the whole public. The direction of the judge, the verdict of the jury,...may be all made subjects of free comment...But in commenting on such matters a public writer, as much as a private writer, is bound to attend to the truth, and to put forward the truth honestly and in good faith and to the best of his knowledge and ability.

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subject for the exercise of public discussion is a matter of the most essential importance. But...it behoves those who pass judgment, and call upon the public to pass judgment, on those who are suitors or witnesses in courts of justice, not to give reckless vent to harsh and uncharitable views of the conduct of others; but to remember, that they are bound to exercise a fair, an honest, and an impartial judgment upon those whom they hold up to public obloquy"[1] Writers in public

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that function, that they do not wantonly assail the character of others, or impute criminality to them, and if they do so, and do not bring to the performance of the duty they discharge that due regard for the interests of others which the assumption of so important a censorship necessarily requires, they must take the consequences[2].

Exception 6.—The object of this exception is that the public should be aided by comment in its judgment of the public performance submitted to its judgment. All kinds of performances in public may be truly criticised, provided the comments are made in good faith "Liberty of criticism", says Lord Ellenborough[3], "must be allowed, or we should neither have purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication therefore I shall never consider as a libel, which has for its object, not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality"

"What is the meaning of a "fair comment"? I think the meaning is this: is the article in the opinion of the jury beyond that which any fair man, however

that limit; if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case ..Mere exaggeration, or even gross exaggeration, would not make the comment unfair However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit The question which the jury must consider is this—would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticised"[4]?

[1] Per Cockburn, C. J., in *Woodgate* v. *Ridout*, (1865) 4 F. & F. 202, 216, 223

[2] Per Cockburn, C. J., in *Tanfield*, (1878) 42 J. P. 423, 424.

[3] *Tobart*] v. *Tipper*, (1808) 1 Camp. 350, 351.

[4] Per Lord Esher M. R., in v. *Carson*, (1887) 20 275.

to be true[1]. Complaints made to Magistrates are not protected if they are not made in good faith[2]. A complaint to a police constable is not privileged[3]. A letter written by a Brahman to the Brahman community of the neighbourhood, with a view to obtain their decision on a matter affecting his own religious interests, and that of the Brahman community, if written in good faith, comes under this exception and exception 10[4].

See s. 52, *supra*, as to the meaning of 'good faith'. In determining the question of good faith the Court should take into account the intellectual capacity of the accused, his predilections and the surrounding facts[5].

Case.—Accusation preferred in good faith to authorised persons.—Where a public servant, in the course of a departmental inquiry, made a statement to the head of his department that the complainant, another public servant, borrowed moneys for his immediate superior, it was held that such statement would be defamatory, if it was untrue and if it was made under such circumstances as would lead the officer to believe that the complainant had borrowed money for his superior from persons connected with the department[6]. The accused, in appealing against the levy of assessment by the complainant (a Mamlatdar) by sale of moveable property, alleged that the complainant acted towards him unjustly and spitefully, that in passing the order appealed against he was actuated by personal ill-will and malice towards the accused, and had exercised his authority with a view to cause harassment and loss to the accused. It was held that the accused was protected by exceptions 8 and 9 in making the statements as they were made in good faith[7]. Certain paddy traders sent to the Traffic Manager of the Burma Railways a telegram containing an allegation that a station master was giving preferential treatment to charcoal dealers and setting forth particulars in support of their allegation. The railway authorities after an inquiry into the allegation held that it was not substantiated, and the station master prosecuted the paddy traders for defamation. They showed that when they sent their telegram they had good reasons for supposing their allegation to be true. It was held that they were entitled to the protection of this exception[8]. Where the accused told his friend E and subsequently at the instance of E wrote to the superior officer of the complainant to the effect that the complainant and the wife of E had been seen behaving on a certain night in such a manner and under such circumstances as to render unavoidable the conclusion that acts of impropriety took place between them and it was found that the accused honestly believed in the truth of the statements, it was held that the accused was not guilty of defamation[9].

Where the creditors of an unadjudicated insolvent suspecting that the complainant was carrying property given to him by their debtor, accused him of being in possession of stolen property, it was held that they had not made the imputation in good faith within the meaning of either exception 8 or 9 and were guilty of defaming the complainant[10].

Accusation made to unauthorised persons.—Where the right to a plot of land was in dispute between the complainant and the accused, and the latter in a petition presented by him to the Municipal Council of his town about the land, made a statement that the complainant was convicted and sentenced to rigorous

1 *Grant*, (1906) 11 C. W. N. 390, 392.

2 *Addul Hakim* v. *Tej Chandar Mukarji*, (1881) 3 All. 815; *Tiruvengada Mudali* v. *Tripurasundari Ammal*, (1926) 49 Mad. 728, F. B., overruling *Muthusami Naidu*, (1912) 37 Mad. 110.

3 *Kakumara Anjaneyalu*, (1916) 17 Cr L. J. 381.

4 *Kashinath Bachaji Bagul*, (1871) 8 B. H. C. (Cr. C.) 168. See *Venkata Reddi*, (1885) 1 Weir 575.

5 *Muhammad Gul* v. *Haji Fazley Karim*, (1929) 56 Cal. 1013.

6 *Krishna Row* v. *Appasawmi Aiyar*, (1891) 1 Weir 585.

7 *Anandrao Balkrishna Rangnekar*, (1914) 17 Bom. L. R. 82, 3 Bom. Cr. C. 15.

8 *Poona*, (1916) 8 L. B. R. 440.

9 *Grant*, (1906) 11 C. W. N. 390.

10 *Bulchand*, (1914) 8 S. L. R. 55.

imprisonment, it was held that the statement to the Municipal Council, though true, was not privileged[1].

Exception 9.—The exception relates to private communications which a

he is not liable [2]. This exception is nothing more than a reproduction of the canon or guiding principle which was stated by Lord Campbell in *Harrison* v. *Bush*[3], namely: "A communication made bona fide upon any subject matter in ... to which he has ... *interest* or *duty*, ... vilege, would be slanderous and actionable".

Any one in the transaction of business with another has a right to use language bona fide, which is relevant to that business, and which a due regard to his own interests makes necessary, even if it should directly, or by its consequences, be injurious or painful to another[4]. The rule of public policy on which this principle is based is that honest transactions of business and of social intercourse would otherwise be deprived of the protection which they should enjoy[5]

... there is express malice or evidence of culpable negligence or recklessness in the dissemination of a libel"[7].

In considering whether there was 'good faith', i e , due care and attention the position of the person making the imputation must be taken into consideration[8]. If good faith was not established it was not strictly necessary to consider if the public good was involved[9]

This exception includes the first exception It refers to any imputation made in good faith, whereas the first exception applies only to true imputation made for the public good. It is not essential that, before a person can be held entitled to the privilege of having made a statement in good faith for the protection of his interests, he should establish that every word he has spoken or written is literally true. If, having regard to certain facts and circumstances within his ... matter is of public interest, the Court ought not to weigh any comment on it in a fine scale; some allowance must be made for even intemperate language, provided, however, the writer keeps himself within the bounds of substantial truth, and does not misrepresent or suppress any facts[11]. The comment must be based on admitted or proved facts Where comment is made on allegations of fact which do not exist, the very foundation of the plea disappears[12].

1 *Ramasami Naidu*, (1895) 1 Weir 612

2 Per Mukerji, J., in *Colonel Bhola Nath*, (1928) 51 All. 313, 327.

3 (1855) 5 E & B. 344, 348.

4 *Slater*, (1890) 15 Bom. 351; *Sher Singh*, (1910) P. W. R (Cr.) No. 6 of 1910

5 *Venkata Narasimha* v. *Kotayya*, (1889) 12 Mad. 374, 377.

6 *Satish Chandra Chakravarti* v. *Ram Doyal De*, (1920) 48 Cal 388, F. B

7 Per Patkar, J, in *Lingangauda Basangauda Patil*, Crim. Appeal No 173 of 1927, decided on September 22, 1927. Cor. Patkar and Baker, JJ. (Unrep. Bom.)

8 *Nagarji Trikamji*, (1894) 19 Bom 340; *Sealy* v. *Ramnarain Bose*, (1865) 4 W. R. (Cr.) 22.

9 *Purna Chandra Ghose*, (1924) 28 C. W. N. 579

10 *Abdul Hakim* v. *Tej Chandar Mukarji*, (1881) 3 All. 815, 817, *Parvataneni* v. *Kasinaduni*, (1914) 15 Cr L J 281.

11 *Fernandez*, (1911) 13 Bom. L. R. 1187, 1188, 1 Bom Cr C 68.

12 *Mir Allabux Khan*, (1929) L R

A person making defamatory expressions for the protection of his son's interests is not privileged, unless the imputation is made in good faith[1]. Where it appeared that the accused in filing his petition of complaint containing defamatory allegations acted with a desire to protect himself by an appeal to the Magistrate, rather than to injure others; it was held that it was not defamation[2].

Communications by a member of a caste.—There is a dividing line between the passing of a resolution at a caste meeting and its communication by the authorities of the caste to its members in their discharge of their social duty. If any member of a caste publish to all its members a caste resolution in such discharge of duties the law will hold the occasion of the publication to be privileged. The member who publishes it is bound to publish it and the members of the caste have an interest in hearing it. But there must be good faith on the part of the member who publishes, that is, it must be proved that the publication was made with due care and attention[3]. If a person really was outcasted, a statement to the members of the brotherhood that he was outcasted is the kind of statement contemplated by the expression "public good". Walsh, J., observed: "So long as caste prevails and it must be remembered that it is sanctified by religious and by racial tradition going back for centuries and forming one of the fundamental characteristics of social life in India, any attempt to minimize, ignore or brush on one side existing regulations, existing sanctions, or respect for existing decisions, must be regarded from the Indian point of view as contrary to the public good. If it is not from the Indian point of view for the public good, caste ought to be abolished. It seems to me that there is no way out of that dilemma, and, therefore, to justify this conviction it was necessary to hold, not merely that the statement was untrue. but that if, as the Sessions Judge thought, it was true, that it was a statement not honestly made for the benefit of the brotherhood"[4]. Where, according to the practice of a caste Sabha, a member who absented himself, when summoned to answer a charge, was excommunicated and the fact reported to all other Sabhas of the caste, and the accused so excommunicated the complainant and reported that fact to all other caste Sabhas, it was held that there was nothing to show that the accused were not acting in good faith[5]. Where the complainant had been put out of caste for having taken water from the hands of a certain person and the accused warned certain other members of the caste that if they took water from the hands of the complainant they would also be liable to be put out of caste, it was held that the action of the accused was protected[6]. The accused having suspected that the complainants were given to drinking liquor, made an application to the caste calling for an enquiry into their conduct. For this they were convicted of defamation. It was held that the accused were not guilty, for, as members of the caste, they had every right to do what they had done, so long as they acted in good faith and for the protection of the interests of the caste: and that the communication was privileged inasmuch as it was not communicated to anybody beyond the caste and all that the accused did was to complain to the caste which had jurisdiction to enquire into the complaint[7]. Where a libellous communication is made regarding a member of a caste, the mere fact that the person making such communication is a member of the caste, will not of itself suffice to make the communication privileged[8]. Where the accused were found to have told different

1 *Pursoram Doss*, (1865) 3 W. R.(Cr.) 45, *Colonel Bhola Nath*, (1928) 51 All. 313, 26 A. L. J. 1334.

2 *Muhammad Gul* v. *Haji Fazley Karim*, (1929) 56 Cal. 1013.

3 *Virji Bhagwan*, (1909) 11 Bom. L. R. 638; *Baga Mahar*, (1923) 25 Cr. L. J. 169.

4 *Umed Singh*, (1923) 46 All. 64, 67.

5 *Ayyaswami Iyer* v. *Annan Thirumala Iyer*, (1924) 19 L. W. 639, 47 M. L. J. 8.

6 *Umed Singh*, (1923) 46 All. 64.

7 *Padam Babul Mhatre*, (1912) 14 Bom. L.R. 585, 1 Bom. Cr. C. 152.

8 *Coopoosami Chetty* v. *Duraisami Chetty*, (1909) 33 Mad. 67. See *Vengala Venkayya* v. *Thallam Venkataramiah*, (1914) 17 M. L. T. 369; *Bishambhar Das* v. *Gobind Das*, (1914) 12 A. L. J. 552.

persons of the same caste that if they associated with one M, they would refuse to smoke or drink with them as M had become a sweeper by reason of his having shaken hands and associated with sweepers in a certain procession in which various classes of persons including some sweepers had joined, it was held that it could not be said that if M had joined the procession or shaken hands with the sweepers, he had thereby become a sweeper, and the effect of the imputation must, therefore, undoubtedly have been to lower his position or character in the estimation of his caste fellows The imputation would have been privileged if a *panchayat* of the caste had been held to discuss the matter and its decision communicated to the persons interested therein. Inasmuch as no *panchayat* had been held, accused's statements could not be regarded as privileged[1]

Caste is not entirely confined to Hindus. It applies to any class of persons who keep themselves socially distinct or inherit exclusive privileges. The fact that all M [illegible] s does not make it the less defamatory [illegible] "outcaste"[2]

Wh [illegible] Panjibhai Jamayat of Khojas to [illegible] notice was "to incite and arouse the intolerance and murderous feelings of the ignorant, deluded and fanatic members of the society to the necessary pitch for and for the express object of taking" his life, it was held that the accused could not claim exemption under exceptions 1 and 9 even though he may have been under a vague apprehension that the effect of his excommunication might be that an ignorant and fanatical adherent of the community might take it into his head to try and murder the accused There was nothing to connect the community with such fanatics, and the privilege, if any, had been exceeded by its publication in the local newspaper[3].

Privileges of Judges, etc.—The privileges of judges, parties, counsel, attorneys, pleaders, and witnesses, come under this exception. So, also, statements made in pleadings and in reports to superior officers are protected by it. (As to civil action, see the authors' "The English and Indian Law of Torts," 10th Edn , p 182).

[illegible]

prosecuted for defamation must be determined by the application of the provisions of the Penal Code and not otherwise[4]. The Patna High Court has adopted the Calcutta view[5].

Judge.—Section 77, no doubt, protects Judges for acts done when acting judicially, and the illustration to exception 7 of this section protects a Judge cen-

1 *Khamani*, (1925) 24 A. L. J. 171.

2 *Yusuf Beg* v. *Maliq Mahomed Sayed*, (1926) 25 L W. 357, 28 Cr. L J 207

3 *Jaffer Fadu*, (1910) 4 S. L R. 67

4 (1872) 11 Beng L. R. (P. C) 321.

5 *Satish Chandra Chakravarti* v. *Ram Doyal De*, (1920) 48 Cal 368, F. B.

6 *Karu Sin* [illegible] 27 Cr. [illegible] 1320.

suring in good faith the conduct of a witness. There is no reported Indian criminal case touching the absolute immunity of judges.

It has been the English law that a Judge "can't be put to answer civilly or criminally for words spoken in office"[1]. An action for defamation cannot be maintained against a Judge for words used by him whilst trying a cause in Court, even though such words are alleged to be false, malicious, and without reasonable cause[2]. "The ground alleged from the earliest times as that on which this rule rests is that if such an action would lie the judges would lose their independence, and that the absolute freedom and independence of the judges is necessary for the administration of justice"[3]. This provision of the law is not intended for the protection or benefit of a malicious or corrupt Judge, but for the benefit of the public, whose interest it is that the Judges do exercise their functions with independence and without fear of consequences[4]. In Madras it has been held that the English authorities on the subject apply to Judges and Courts in India[5].

Counsel, pleader, etc.—According to common law no action will lie against an advocate for defamatory words spoken with reference to, and in the course of, an enquiry before a judicial tribunal, although they are uttered by the advocate maliciously and not with the object of supporting the case of his client, and are uttered without any justification or even excuse and from personal ill-will or anger towards the person defamed arising out of a previously existing cause, and are irrelevant to every issue of fact which is contested before the tribunal[6]. The rule is made so wide not to protect counsel who deliberately and maliciously slander others, but in order that innocent counsel who act bona fide may not be "unrighteously harassed with suits".

The advocate "is trusted with interests and privileges and powers, almost to an unlimited degree. His client must trust to him at times for fortune and character and life. The law trusts him with a privilege in respect of liberty of speech which is in practice bounded only by his own sense of duty, and he may have to speak upon subjects concerning the deepest interests of social life and the innermost feelings of the human soul...his words and acts ought to be guided by a sense of duty—that is to say, duty to his client—binding him to exert every faculty and privilege, and power in order that he may maintain that client's right, together with duty to the Court and himself, binding him to guard against the abuse of the powers and privileges intrusted to him, by a constant recourse to his own sense of right"[7].

In *Sullivan* v. *Norton*[8], the Madras High Court has applied the common law principle to advocates in this country. Collins, C. J., in this case said: "I think that the advocates in this country have and should have the same privileges in respect of liberty of speech (bearing always in mind the remarks of Erle, C. J., in *Kennedy* v. *Broun*) they have so long enjoyed in England; and that in this country it would be beyond measure embarrassing to the advocate and disastrous to the interests of the client, if the advocate was exposed to the liability of a criminal or civil charge for defamation for words uttered in Court...

"I disagree with the learned Acting Advocate-General that an advocate is bound to consider the position in life of the person whose conduct he is condemning. His words and acts ought only to be guided by a sense of duty—duty to his

1 Per Lord Mansfield in *Skinner*, (1773) Lofft. 55, 56.

2 *Raman* v. *Subramanya*, (1893) 17 Mad. 87; *Moulavie Ally Kurreem* v. *Teignmouth Sandys*, (1856-59) Boul. 1; *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668.

3 Per Lord Esher, M. R., in *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668, 670.

4 *Raman* v. *Subramanya*, (1893) 17 Mad. 87; *Scott* v. *Stansfield*, (1868) L. R. 3 Ex. 220; *Fray* v. *Blackburn*, (1863) 3 B. & S. 576.

5 *Sullivan* v. *Norton*, (1886) 10 Mad. 28, F. B. See also the judgment in *Nagarji Trikamji*, (1894) 19 Bom. 340.

6 *Munster* v. *Lamb*, (1883) 11 Q. B. D. 588.

7 Per Erle, C. J., in *Kennedy* v. *Broun*, (1863) 32 L. J. (C. P.) 137, 146, 147.

8 (1886) 10 Mad. 28, 35, F. B.

client—and by a constant recourse to his own sense of right to guard against the abuse of the powers and privileges entrusted to him".

Recent [illegible]
laid down: "[illegible]
thus compell[illegible]
everything which may assist his client, good faith is to be presumed, and bad faith is not to be assumed merely because the statement is *prima facie* defamatory, but that there must be some independent allegation and proof of private malice from which in the circumstances of the case the Court considers itself justified in inferring that the statement was not made because it was necessary in the interests of the client but that the occasion was wantonly seized as an opportunity to vent private malice...I take it that this principle implies and carries with it this other principle, that even the presence of malice will not override the presumption of good faith, where the statement made was obviously necessary in the interests of the client, and where the lawyer could not omit to make it without gravely imperilling the interests of his client and would in fact not be discharging his duty to his client unless he made it; that is, that, even though some private malice is gratified by the publication of the statement, if such publication was imperatively called for in the interests of his duty to his client, the presence of such malice will not negative the presumption of good faith"[1].

The Bombay High Court has, however, observed that *Sullivan* v. *Norton* [illegible] 'hout reference to [illegible] (and it ought not [illegible] ould be extremely cautious before it deprived the advocate of the protection of this exception[2] But, in a subsequent Full Bench case it has expressly laid down that in this country an advocate enjoys the same mea[illegible]
cannot be punished for acting on [illegible]
could not know that they were fa[illegible]
so long as his language is justified by his instructions, or by the evidence, or by the proceedings on the record. The mere fact that his words are defamatory, or that they are calculated to hurt the feelings of another, or that they ultimately turn out to be absolutely devoid of all solid foundation will not make him responsible nor render him liable in any civil or criminal proceeding[3] In a later case the same High Court, after expressing a doubt whether an advocate or a pleader has the unqualified privilege accorded to him in England, held that when a pleader is charged with defamation in respect of words [illegible]
his duty as a pleader, the Court ought to pre[illegible]
criminally liable unless there is satisfactory [illegible]
less there is cogent proof that unfair advantage was taken of his position as a pleader for an indirect purpose[4]

The Calcutta High Court has held that it is not defamation for a pleader to put a question in cross-examination to a witness, for the purpose of impeaching his credit, even if it appears that the question assumed a state of facts to be true, which was not really so, if it is based on facts known to the pleader, which knowledge was used in apparent good faith, entirely in the interest of his client and not for his own ends. The Court said · "It seems to us, especially in the mofussil of this country, where instructions, to the personal knowledge of one of us, are very commonly inaccurate and misleading, that a pleader would certainly be at least

[1] *Mir Anwarrudin* v. *Fathim Bai*, (1926) 50 Mad. 667, 670-1.

[2] *Nagarji Trikamji*, (1894) 9 Bom 340, followed in *Upendra Nath Bagchi*, (1909) 36 Cal. 375.

[3] *Bhawshanker* v. *Wadia*, (18[illegible]) [illegible] L. R. 3, F. B

[4] *Purshottamdas Ranchhoddas*, ([illegible]) [illegible] Bom L. R. 1287.

as much justified in acting on his own recollection as on specific instructions, and we do not think that, because he has drawn merely a wrong inference from a fact, that of itself, in the absence of any malice, should take him out of the ninth exception to s. 499"[1]. Following this case it has further held that a question put to a witness in cross-examination by a pleader making an imputation affords no ground for a criminal prosecution. A pleader is entitled to the presumption that the questions he asked in cross-examination are asked in good faith for the protection of the interest of his client. To rebut this presumption there must be convincing evidence that the pleader was actuated by an improper motive personal to himself and not by a desire to protect or further the interests of his client in the cause. It is the duty of the pleader to present his client's case, but it is not his duty to enquire whether it is true or false, so far, at any rate, as the purposes of a prosecution for defamation are concerned. The Court said: "It is for the public good that a person charged with the responsibility of an advocate should, so far as may be, feel unfettered by any control other than that of the presiding Judge, in the use of every weapon placed at his disposal by the law for the defence of the liberty of his client. The provisions of the ninth exception to s. 499...must be interpreted accordingly"[2]. A pleader must use a certain amount of common sense and caution in putting defamatory questions. There may be cases where, under proper instructions, he may ask such questions to impeach the credit of the witness, unless he knows the latter's good character and reputation. But where the questions were put with utter recklessness, and without regard to seeing whether there was any truth in them and with absolute disregard of whether he was entitled to ask them or not, and they were not put for the good of the suit but to injure the reputation of the witness publicly, they were held to have been asked in absolutely bad faith. Where a pleader asked a witness, who was a defendant in a civil suit in the capacity of a *mukhia*, whether he was a thief and gambler and dined with prostitutes, and whether his wife was leading the life of a prostitute, it was held that the pleader, in putting the questions, had acted in bad faith, inasmuch as he had asked the witness to compromise the suit and had threatened him on his refusal; that the witness was admittedly a *mukhia*, and the question as to his wife was irrelevant; that the witness was well known in the town where the pleader resided, so that the latter must have known of his reputation and character, and that he was guilty of defamation[3]. In a recent case the Court observed: "So far as the English law is concerned, it is settled that advocates have absolute and unqualified privilege in respect of questions asked in cross-examination. So far as advocates in this country are concerned, by which expression I include vakils as well as pleaders, they have not such qualified and absolute privilege as is accorded to their brethren in England. It is not defamatory to make imputation on the character and position in life of a witness, provided that the imputation is made in good faith and for the protection of the client who has engaged the advocate (see s. 499, exception 9). The presumption, therefore, is that a question asked in cross-examination, making an imputation as regards a witness, affords no ground ordinarily for a criminal prosecution, and that it is the duty of a Court, when complaint is made against an advocate for having used defamatory words, that it should ordinarily be presumed that the remark or question objected to was made on instructions and in entire good faith. No doubt there may be circumstances which may show that the question or remark objected to was made wantonly, or from malice or from private motive; but the greatest care ought to be taken to enquire into the circumstances, and, as stated in the Rangoon

1 *Upendra Nath Bagchi*, (1909) 36 Cal. 375, 383.

2 *Nikunja Behari Sen* v. *Harendra Chandra Sinha*, (1913) 41 Cal. 514, 517.

3 *Fakir Prasad Ghose* v. *Kripasindhu Pal Bhuti*, (1926) 54 Cal. 137.

case (*McDonnell* v. *King-Emperor*[1]), an opportunity should be given to the party accused of such offence to offer explanations before summons is issued[2]".

A pleader who files a petition containing defamatory statements on behalf of his client, cannot be prosecuted where there is no allegation of any malice or absence of good faith on his part[3].

The Patna High Court has held that the liability of an advocate charged with defamation in respect of words spoken or written in the performance of his professional duty depends on the provisions of this section: the Court will presume good faith unless there is cogent proof to the contrary The privilege is not absolute but qualified, but the burden is cast upon the prosecution to prove absence of good faith. The common law of England, under which an advocate can claim absolute privilege for words uttered in the course of his professional duty, is not applicable to India. An advocate in this country, therefore, is not entitled to claim absolute privilege, and, in cases of prosecution for defamation, his liability must be determined on reference to the provisions of this section[4]

The Rangoon High Court has held that the English law of absolute privilege does not apply to statements of advocates in judicial proceedings Legal practitioners are subject to the criminal law of defamation in this section When a complaint is made against an advocate or legal practitioner for defamation in respect of a statement made in the course of a judicial proceeding, it is the duty of the Court to presume that the statement was made on instruction and in good faith and for the protection of his client's interest, and that unless circumstances clearly show that the statement complained of as defamatory was made wantonly or from malicious or private motive, the complaint should not be entertained[5]. An advocate cannot shelter himself behind his clients when he allows himself to be made *the medium of reckless imputations on a Court of Justice*[6]

Witness.—According to English law a witness in a Court of Justice is absolutely privileged as to anything he may say as a witness having reference to the inquiry on which he is called as a witness A statement as to another matter, made to justify the witness in consequence of a question going to the witness' credit has reference to the enquiry within the above rule[6]. But a remark made by a witness in the box, wholly irrelevant to the matter of enquiry, uncalled for by any question of counsel and introduced by the witness maliciously for his own purposes, would not be privileged An observation made by a witness while waiting about [illegible]

[illegible] the Indian Evidence Act, in cases where the witness has not objected to answering the question put to him[9].

According to the Calcutta High Court a witness who, being actuated by malicious motives, makes a voluntary and irrelevant statement, not elicited by any question put to him while under examination, to injure the reputation of

[1] (1925) 3 Ran. 524

[2] *M. Banerjee* v. *Anukul Chandra Mitra*, (1927) 55 Cal 85, 89; *Nazir Ahmad* v. *Jogeshchandra Banerjee*, (1928) 29 Cr. L. J 889

[3] *Nazir Ahmad* v. *Jogeshchandra Banerjee*, [illegible]

[7] *Trotman* v. *Dunn*, (1815) 4 Camp. 211; [illegible]

another, commits an offence under this section[1]. If the statements are relevant to the issue in the case under enquiry no prosecution for defamation would lie[2]. Where the accused, shortly after the disposal of a criminal case against him brought by one B, stated openly in answer to a query of his pleader in that case that the origin of the criminal case was due to the fact that some one of the accused's party had said at a social gathering that B's daughter-in-law had eloped, and he was subsequently prosecuted for defamation for making a statement defamatory of B, it was held that the statement of the accused did not constitute this offence as it was not made with the intention of harming the reputation of anybody, but was made in answer to a natural question put to him by his legal adviser at a time when the relationship of legal adviser and client continued[3]. This principle has been extended to a person for what he states in answer to questions put to him by a police-officer conducting an investigation under the Code of Criminal Procedure[4]. Subsequently, however, the Judges felt disposed to refer the question to a Full Bench but it was not referred[5].

The Madras High Court following the English law laid down in *Manjaya* v. *Shesha Shetti*[6] that statements of witnesses made in the witness-box are absolutely privileged. If they are false the remedy is by indictment for perjury and not for defamation. This case has been followed in a later case[7], in which the complainant brought a suit for money against the defendant in the Munsiff's Court. The defendant pleaded that the suit was brought out of spite, and, in reply to questions put to him by the Court, he gave answers which were defamatory of the plaintiff. The accused on these facts was convicted of defamation. In revision it was held that he was not liable for defamation for using the language he did. Recently, the High Court has dissented from the view in *Manjaya's* case and held that statements made by a witness are entitled not to an absolute but only to a qualified privilege[8]. A witness who is prosecuted for defamation in respect of statements made by him has two courses open to him. He may plead in bar of the prosecution the protection given to him under s. 132, Evidence Act. If he did not claim the protection of s. 132 when he gave his evidence he can claim only the limited privilege given by this exception or any other exception[9].

The Allahabad High Court has held that if a witness whilst giving evidence makes a statement concerning any person which amounts to defamation, he may be prosecuted under this section in respect of such statement, and it lies upon him to show that the statement which he has made falls within one or other oft he exceptions or that he is protected from prosecution by the proviso to s. 132 of the Evidence Act. In this case one Ganga Prasad was a witness for the defence on the trial of one Birbal for theft. When put into the witness-box he was asked what he knew about Birbal's case. He replied that he knew nothing ; but he added of his own accord that he knew that Birbal had stolen his watch eight years previously and that he had to give Rs. 10 to one Banke Lal, whom he pointed out as one of the persons present in the Court, before he got the watch back. He said, further, that if his house was searched, "thousands of rupees worth of stolen property would be found". It was found that Banke Lal was a respectable Zemindar, and that he was a drug contractor for the Moradabad district and paid Rs. 400 as

1 *Haidar Ali* v. *Abru Mia*, (1905) 32 Cal. 756 ; *Moher Sheikh*, (1893) 21 Cal. 392 ; *Mohunt Pursoram Doss*, (1865) 2 W. R. (Cr.) 36 ; *Pursoram Doss*, (1865) 3 W. R. (Cr.) 45. See, however, *Kali Nath Gupta* v. *Gobinda Chandra Basu*, (1900) 5 C. W. N. 293.

2 *Woolfun Bibi* v. *Jesarat Sheikh*, (1899) 27 Cal. 262.

3 *Debendra Nath Shah* v. *Bhagirath Shaha*, (1909) 13 C. W. N. 1087.

4 *Methuram Dass* v. *Jaggannath Dass*, (1901) 28 Cal. 794. See *Govinda Pillai*, (1892) 16 Mad. 235, to the same effect.

5 *Profulla Kumar* v. *Harendra Nath*, (1916) 44 Cal. 970.

6 (1888) 11 Mad. 477, 479.

7 *Alraja Naidu*, (1906) 30 Mad. 222, 223.

8 *Peddabba Reddi* v. *Varada Reddi*, (1928) 52 Mad. 432.

9 *Ibid ; Gopal Doss*, (1881) 3 Mad. 271, F.B.

income-tax. Banke Lal prosecuted Ganga Prasad for defamation. The Joint [illegible] ... [illegible] viction was upheld by the Sessions Court. [illegible] the plea of absolute privilege and applied to [illegible] the conviction on the same ground. The [illegible] nd Richards, J., but on difference between them had to be posted again before a third Judge. Richards, J., holding in favour of the privilege and Knox, C. J., holding otherwise. Mr. Justice Aikman, the third Judge, concurred with Knox, C. J.[1] In a later case, Piggott J., following the above case, said: "[This] Exception is intended primarily to apply to statements which the accused cannot prove to have been true in fact or which are mere expressions of opinion, or otherwise of such a nature that the question whether they are or are not true in fact does not arise. Ordinarily, the first Exception would apply to statements made by the witnesses in the course of judicial proceedings, provided those statements are true. They must be true in fact in order to come under the first Exception at all, and if they are true in fact and relevant to the matter under investigation, it is obviously for the public good that they should be made"[2].

Thus the opinion of the Bombay, Calcutta and Allahabad High Courts [illegible]

[illegible] class in respect of statements made by them in that character. The true test of immunity in the case of witnesses, as of other persons, was whether the exception was established in its entirety[3]

The former Judicial Commissioner's Court of Upper Burma followed the Calcutta and Allahabad rulings[4].

Parties.—According to English law no action can be brought for any statement made by parties during the conduct of a case.

The Bombay High Court has held that a complainant who, when asked by the Magistrate to state his grievance, deliberately makes a defamatory statement without any justification is not protected by this exception[5]. Whilst an application and a counter-application to prevent a breach of the peace were being investigated into by the police, the accused called the complainant a 'rogue'. It appeared that some four months previous the complainant was convicted and fined at the instance of the accused. The accused having been convicted of defamation, it was held that the accused was protected by this exception inasmuch as the statement was made apparently for the protection of his own interests and [illegible]

[1] *Ganga Prasad*, (1907) 29 All 685, F. B., referred to in *Champa Devi* v *Pirbhu Lal*, (1925) 24 A. L. J. 329. See also *Muhammad Sher Ali Khan* v. *Ghasi Ram*, (1920) 22 Cr L. J. 159

[2] *Kallu* v. *Sital*, (1918) 40 All 271, 275.

[3] *Maya Das*, (1893) P. R. No 14 of 1893; *Phundi Ram*, (1910) P W R. (Cr.) No. 7 of 1911; *Miran Sha*, (1912) P. W. R. (Cr) No. 31 of 1912, P. L. R. No. 244 of 1912.

[4] *Meer Bux* v. *[illegible] Pe*, (191[illegible]) [illegible] U. B. R. 101.

[5] *Dinsha [illegible]* v. *Jehangir [illegible]* (1912) 47 [illegible] L. R. [illegible] Cr. C. [illegible]

[6] *[illegible]*, (1915) [illegible] L. R. [illegible] C. 255.

criminal proceeding lie for defamation"[1]. Where, therefore, a person who was being defended by a counsel on a criminal charge interfered in the examination of a witness and made a defamatory statement with regard to his character, it was held that he was guilty of defamation[2]. But where, in the course of a criminal trial, the pleader who defended the accused put a question to the complainant who was examined therein as a witness, conveying an insinuation of being implicated in a crime, it was held that the accused was not guilty of defamation[3]. Statements of a defamatory character made by an accused in the course of the statement which he is invited to make under s. 312, Criminal Procedure Code, is privileged[4]. In a Full Bench case the Madras High Court held that the statement of a person charged with an offence in answer to a question by the Court trying him, "what have you to say", is absolutely privileged and he is not liable to be punished in respect thereof for defamation under the Penal Code. The privilege is not merely a qualified privilege, i. e., it is not subject to the condition that it should be made in good faith. The Court further said that the law of defamation as laid down in the Penal Code did not exclude the application of the doctrine of absolute privilege from the law of defamation in India; and that the English rule of common law, that anything said in the course of a judicial proceeding before a Court of competent jurisdiction by counsel, witness or party was absolutely privileged, applied in India[5]. This case has been considered in a Full Bench case and the High Court has dissented from the view expressed therein, observing: "The privilege defined by the exceptions to s. 499...must be regarded as exhaustive as to the cases which they purport to cover and that recourse cannot be had to the English Common Law to add new grounds of exception to those contained in the statute"[6]. Where a defamatory statement is made before an officer, who is neither a judicial officer nor a Court, e.g., a registration officer, it has been held that it is not absolutely privileged[7].

In a Special Bench case the Calcutta High Court laid down that a defamatory statement, on oath or otherwise, by a party to a judicial proceeding falls within s. 499, and is not absolutely privileged. Under cl. 30 of the Letters Patent, 1865, the provisions of such Code must be followed, and the Court cannot engraft thereon exceptions derived from the common law of England or based on public policy. The civil liability for defamation does not stand on the same basis as the criminal. A suit for damages for a defamatory statement, made on oath or otherwise, by a party to a judicial proceeding, in the absence of statutory rules on the subject, is governed by the principles of justice, equity and good conscience, which, according to a large preponderance of judicial opinion, are identical with the corresponding relevant rules of English common law[8]. If imputation is made by the accused against the complainant in a petition to the Magistrate in good faith with a view to protect himself by an appeal to the Magistrate, no offence is committed[9].

Where, in a prosecution for defamation in respect of statements made by the accused as complainant in a criminal case, the accused pleaded *inter alia* his privilege as a suitor, the Allahabad High Court held that the plea was bad, inas-

[1] *Hayes* v. *Christian*, (1892) 15 Mad. 414, 415.

[2] *Hayes* v. *Christian*, *Ibid.*

[3] *Venkata Narasimmam* v. *Venkatasubarayadu*, (1888) 1 Weir 587; *Padmaraju Pantulu* v. *Venkataramana Iyer*, (1908) 6 M. L. T. 15.

[4] *Payini Chellaya*, (1909) 5 M. L. T. 256.

[5] *Venkata Reddy*, (1912) 36 Mad. 216, 223, F. B.

[6] *Tiruvengada Mudali* v. *Tripurasundari Ammal*, (1926) 49 Mad. 728, 737, F. B.

[7] *Krishnamal* v. *Krishnaiyangar*, (1912) 23 M. L. J. 50, [1912] M. W. N. 473, F. B.

[8] *Satish Chandra Chakravarti* v. *Ram Doyal De*, (1920) 48 Cal. 388, F. B.; *Isuri Prasad Singh* v. *Umrao Singh*, (1900) 22 All. 234; *Byrne*, (1911) 5 S. L. R. 133; *Baiju* v. *Babu*, (1918) 19 Cr. L. J. 641.

[9] *Gadali*, [1929] Cr. C. (Cal.) 523.

much [illegible] not apply [illegible] abad High Court[3].

The former Chief Court of Lower Burma laid down that the statement of a person accused of a criminal offence was not privileged. The statement in that case, however, was not a statement made by an accused person on his trial for committing an offence, but in a written statement filed in proceedings which, though before a Magistrate, partook largely of a civil nature, by a person who was not only a competent witness, but who clearly ought to have gone into the witness-box[3]. The Rangoon High Court has held that a party who gives evidence on his own behalf in a judicial proceeding may be prosecuted for any defamatory statement made in the course of his evidence He may, however, plead this exception in defence[4].

Pleadings.—Authority is strongly against the absolute immunity from prosecution for defamatory statements contained in applications, pleadings and affidavits.

The Allahabad High Court has held in a Full Bench case that the defamatory statements made by a party in a petition presented to a criminal Court are absolutely privileged in a civil action for damages based on libel[5] In an application for the transfer of a criminal case the applicants alleged, with some apparent reason, that the case had been falsely got up against them by the complainant at the instigation of one U, in order to prejudice them in their defence in a civil suit which U had caused to be brought against them It was held that this statement did not amount to defamation as it fell within the ninth exception[6] But the Allahabad High Court has subsequently held in a case in which the accused was prosecuted for making a defamatory imputation in a written statement that there is a distinction between criminal and civil liability for defamation. Civil liability is to be determined by the principles of English law but criminal liability is governed by the provisions of the Penal Code and by those provisions alone[7].

The Calcutta High Court is of opinion that defamatory matter appearing in a plaint is not privileged. It convicted the accused in a case for describing the complainant in his plaint by a wantonly offensive designation[8] A person is guilty of defamation for making a defamatory statement in an affidavit if the statement is wholly irrelevant to the enquiry to which the affidavit relates[9] The act of filing in Court a petition containing imputations concerning a person calculated to harm his reputation amounts to making or publishing the imputation[10]. The procedure of the Courts of Justice should not with impunity be used as the means of indulging in feelings of personal spite Where a person, without any reasonable ground, filed a petition before a Magistrate to the effect that certain persons were preparing to bring false charges against him, he was convicted of

[1] *Gajadhar*, (1890) 10 A W. N 170, *Mohammad Samiullah Khan* v. *Bishu Nath*, (1927) 26 A L J. 760 But see the judgment of Subrahmania Ayyar, J, in *Nadu Gounden*, (1899) 1 Weir 589

[2] *Fateh Muhammad*, (1889) P. R. No 34 of 1889; *Kirpal Singh* v. *Hukam Singh*, (1889) Note to P R. No. 34 of 1889, at p 131, *Phundi Ram*, (1910) P. W. R. (Cr.) No 7 of 1911.

[3] *Iyer* v *Mudaliar*, (1917) 11 B. L. T. 104

[4] *Sayed Ali*, (1925) 4 B. L. J 181.

[5] *Chunni Lal* v. *Narsingh Das*, (1917) 40 All 341, F B., overruling *Abdul Hakim* v. *Tej Chandar Mukarji*, (1881) 3 All 815 Information or a report made to the police does not come within this principle *Majju* v. *Lachman Prasad*, (1924) 22 A. L J 597.

[6] *Isuri Prasad Singh* v. *Umrao Singh*, (1900) 22 All 234

[7] *Champa Devi* v *Pirbhu Lal*, (1925) 24 A. L J [illegible]

(Cr) 36.

defamation[1]. It has held in a case that statements made by a complainant before a Magistrate by way of a complaint are absolutely privileged[2]. In a subsequent case, after distinguishing this decision on the ground that the privilege claimed there was not in a criminal prosecution but in a suit for damages, it was held that there was no absolute privilege for a defamatory statement made in bad faith in an application filed before a District Magistrate by an accused for the transfer of his case; that the question of privilege must be decided by the terms of s. 499 which was exhaustive and if a defamatory statement did not come within the exceptions, it was not privileged; and that the English common law doctrine of absolute privilege did not obtain in the mofussil in India[3]. But on similar facts another Division Bench of the same High Court had previously held that a complainant making untrue statements in such an application could not be convicted of defamation[4].

The Bombay High Court has held that relevant statements made by an accused under s. 342, Criminal Procedure Code, or contained in a written statement filed by an accused with the Court's permission, are not absolutely protected from being the subject of a prosecution under s. 500, but are governed by the provisions of s. 499[5]. In a civil action it has held that statements in pleadings are not actionable[6].

The Madras High Court remarked in *Hinde* v. *Baudry*[7]: "If they (defendants) were rightfully making an application in the suit, the principle of public policy which guards the statement of a party or witness against an action would protect them whether the statement was malicious or not". It is of opinion that there is no difference between evidence given in the box and the evidence on affidavits, in that they are both absolutely privileged and no suit for damages will lie in respect of evidence given therein[8]. But in a Full Bench case it has decided that a defamatory statement in a complaint to a Magistrate is not absolutely privileged[9].

The Patna High Court has held following the Calcutta view that a defamatory statement whether on oath or otherwise, falls within s. 499, and is not absolutely privileged. Where in a plaint the accused described the complainant (defendant No. 3) as the "kept woman" of defendant No. 1 without any foundation, it was held that he was guilty of defamation[10].

The former Chief Court of the Punjab laid down that a person who made defamatory statements in petitions might be convicted of defamation[11]. The former Chief Court of Lower Burma was also of the same view[12]. The Rangoon High Court has held that in criminal prosecutions for defamation, whether a statement was made on an occasion of privilege or not is to be decided with reference to the provisions of s. 105 of the Evidence Act and this section[13].

According to English law no action lies for any statement made in the pleadings[14].

1 *Shibo Proshad Pandah*, (1878) 3 C.L.R. 122.

2 *Golap Jan* v. *Bholanath Kettry*, (1911) 38 Cal. 880. So far as civil Courts are concerned it has, however, decided that defamatory statements in pleadings are not absolutely privileged: *Augada Ram* v. *Nemai Shaha*, (1896) 23 Cal. 867; *Sandyal* v. *Bhabd Sundari Debi*, (1910) 15 C. W. N. 995. These decisions do not appear to have been brought to the notice of the learned Judges who decided *Golap Jan's* case.

3 *Kari Singh*, (1912) 40 Cal. 433.

4 *Kori Singh* v. *J. Finch*, (1912) 17 C. W. N. 449, 40 Cal. 441, *foot-note*.

5 *Bai Shanta* v. *Umrao*, (1925) 50 Bom. 162, 28 Bom. L. R. 1, 8 Bom. Cr. C. 193, F.B.

6 *Nathji* v. *Lalbhai*, (1889) 14 Bom. 97.

7 (1876) 2 Mad. 13, 14.

8 *Adapaka Adivaramma* v. *Rabola Ramachandra Reddy*, [1910] M. W. N. 155, 8 M.L.T. 55.

9 *Tiruvengada Mudali* v. *Tripurasundari Ammal*, (1926) 49 Mad. 728, F. B., overruling *Venkata Reddy*, (1913) 37 Mad. 216, F. B; *Muthusami Naidu*, (1912) 37 Mad. 110.

10 *Karu Singh*, (1926) 7 P. L. T. 587, following *Kari Singh*, (1921) 40 Cal. 433.

11 *Kirpa Ram*, (1887) P. R. No. 21 of 1887.

12 *Maung Mya Thi* v. *Henry Po Saw*, (1906) 13 Burma L. R. 96.

13 *Ma Mya Shwe* v. *Maung Maung*, (1924) 2 Ran. 333; *Subramonia Aiyar* v. *Thirumudi Mudaliar*, (1917) 18 Cr. L. J. 1019.

14 *Revis* v. *Smith*, (1856) 18 C. B. 126.

Report.—The report of an officer, in the execution of his duty, under his superior's orders, which contains defamatory imputations against others, but which does not appear to have been made recklessly or unjustifiably is covered by this exception. An Inspector of Police sent to enquire whether it was true that a certain person was the leader of dacoits reported that it was false, but the Banias of the village were trying to get the man punished from an ill-feeling, and added: "I learn from private enquiries that there is scarcely a woman in the house of the Banias who has not passed a night or two with the defendant". It was held that he was not protected by this exception[1].

Cases.—Statement made to protect the interest of another.—Where a man who was watching a case on behalf of his partner informed the judge, while the hearing was going on, that the complainant was tampering with the witnesses and [illegible] Court, and it appeared that [illegible] tion, it was held that the [illegible] the firm of J. S & Co, found his claims against J resisted until he sued and got decrees against him K came to know that V, a member of J.'s firm, had presented his petition in insolvency. K also knew that V at the time of filing his petition had claims against J's firm. K thereupon circulated amongst persons who had dealings with the firm of J. S & C[illegible]

[illegible] standings and were not in a position to give an effectual discharge to persons making payments; and (3) that K was taking steps to have all the other members declared insolvents. It was found that the firm of J. S. & Co. was without capital, and that subsequently to writing the letter K did file a petition of insolvency against the other members of the firm, though unsuccessfully. It was held that there was no defamation as the case fell under ill. (*a*) to this exception[3].

Statement made to protect the interest of the maker.—The heads of the caste, to which both the complainant and the accused belonged, prohibited the members of the caste from holding intercourse with the complainant In ignorance of this prohibition, the complainant's niece invited the complainant to a family ceremony. The accused, observing the complainant, asserted that she had been put out of caste, and insisted that she should retire. It was held that they had made [illegible] caste penalties, and were [illegible] a *punchayat*, conveyed [illegible] the epithet 'pariah dog' to the complainant, made a statement by way of explanation, it was held that such statement was privileged[4]. Where a person was charged before a *panchayat* with [illegible]

panchayat was made in good faith in order to explain his beating of the complainant and was covered by exceptions 8 and 9[6].

The complainant charged the accused with forgery. The accused in his statement before the Magistrate stated that the complainant was kept by him as his concubine for some years and was afterwards in the keeping of another person.

[1] *Rajnarain Sein*, (1870) 6 Beng. L R. (App), 42, 14 W. R. (Cr.) 22 See *Sher Singh*, (1880) P. R. No. 23 of 1880; *Mohammad Samiullah Khan* v. *Bishu Nath*, (1927) 26 A. L. J 760

Purshotam Kala, (1885) 9 Bom. 269.

Cassem Kurrim v. *Jonas Hadjee Seedick*, (1904) 9 C. W. N. 19[illegible]

[4] *Chalil Kothali*, (18[illegible]) [illegible]; *Visia-muri Subramania Aiyah*, [illegible]

[5] *Govindappa Nayak*, [illegible]

[6] *Nanhey* v. *Pyari Lal*, [illegible] J. 938.

It was held that the statement was privileged as it was made for the purpose of defence by way of showing the motive for the complaint and for the evidence of one of the witnesses[1]. Where the accused, when on his trial on a criminal charge, was asked by the Magistrate if he wished to say anything with reference to the evidence that had been given against him, in reply stated that his grandfather had at one time kept the wife of the complainant as his concubine, and it was found that the statement was made by the accused for the protection of his interest but was false and not made in good faith, it was held that he was not protected under this or any other exception[2]. Subrahmania Ayyar, J., who held a contrary opinion, said: "As to...parties it must be borne in mind that there is no real difference between the case of witnesses and that of civil suitors. For neither witnesses nor suitors need say what they do not know to be true, and if they knowingly say what is not true, they are equally liable to be proceeded against for the false statements made in the evidence or in the verified pleadings. No doubt, an accused person cannot be indicted for perjury for false statements made by him in the course of defence. This immunity given in consideration of the difficult position occupied by those who are accused of crimes is surely an argument in favour of their case being viewed as entitled to a more lenient treatment than the case of witnesses or civil suitors. It seems to me, therefore, that in principle there is no solid distinction between the respective cases of counsel, witness and party with reference to the matter under discussion". Where the complainant served a lawyer's notice on the accused who was her deceased husband's nephew charging him with theft and criminal breach of trust with regard to properties left by her husband and threatening him with civil and criminal proceedings, and the accused in reply to the notice sent a letter, also through his lawyer, alleging that the complainant was living an adulterous life, that her daughter was not born to her husband, that she had been discarded by him during his life-time and that she had lost all right to his property, and he relied on a will made by the deceased in his favour in which the testator had stated that there was none to protect him, it was held that the accused was protected by this exception, as there was a matter of common interest between the complainant and the accused relating to the title to property left by the deceased giving rise to qualified privilege and there was no malice or want of bona fides or presence of improper motive in the accused[3]. Where the accused, who was doing the same kind of business as the complainant, in a notice published by him, referred to an employee of the complainant as having no knowledge of the business from his own experience about him, and stated that the business could not have improved by the employment of such a man. It was held that the notice was not defamatory of the complainant[4].

Statement made without good faith.—The complainant desired a Magistrate to ask a witness if he had not been previously convicted. The question was objected to and, before the Magistrate had decided whether it should be put, the witness cried out: "I was convicted because I had Casim Saheb's wife in my house", and, though warned by the Magistrate not to repeat it, he did so. It was held that he was guilty of defaming Casim Saheb's wife[5].

Imputations made by pleaders.—Where a pleader, in addressing a Mamlatdar on behalf of the accused, commented on some of the witnesses for the prosecution, and called them 'loafers', and was prosecuted for defamation, it was held that, in the absence of express malice (which was not to be presumed), the pleader was protected by this exception, and that in considering whether there was good faith, the position of the person making the imputation must be taken into considera-

1 *Murugesa Pillai*, (1897) 1 Weir 612.
2 *Nadu Gounden*, (1899) 1 Weir 589, 592.
3 *Sankamma* v. *Govinda Chetty*, (1924) 26 Cr. L. J. 428.
4 *Madan Singh*, (1888) 1 Weir 593.
5 *Syed Hussain*, (1881) Weir (3rd Edn.) 357.

tion[1]. A pleader representing a complainant wrote to the trying Magistrate to enquire when the latter would take up the case for trial; and in the letter described the accused as a notorious 'wrong-doer'. On a prosecution for defamation it was held that the pleader was guilty as the libel was not uttered by him in the discharge of his duty as a pleader[2].

The accused, a *mookhtiyar*, at the request of one B, drew out a petition containing certain defamatory charges against C, and, declining to accept the *mookhtiyarnama* on B's behalf, gave him the petition to present it It was held that although a *mookhtiyar* was not liable for defamation if, relying on the statements of his clients, he introduced into a pleading in good faith a defamatory averment, yet as the accused was not employed as a *mookhtiyar* in that case, and by his refusing to accept a *mookhtiyarnama*, it was shown that the defamation of which he had been convicted was not published in the discharge of any duty, this exception did not apply[3]. Where a pleader, immediately after the close of a trial in which his client lost his case, wrote a letter to the client stating that there was a rumour prevalent that the Judge had received a bribe from the opposite party, and that the complainant, who had conveyed the bribe, had appropriated a portion of the same, it was held that, if a rumour really existed, the pleader would have been justified in communicating it with due care and attention, but that the [illegible] truth of the rumour [illegible] prevent the client, [illegible] ment to others, had not acted with care and attention necessary to constitute good faith, and that he was not, therefore, protected by exceptions 9 and 10[4].

Exception 10.—"To bring this case within exception X [illegible] it must be proved that the accused intended in good faith to convey a caution to one person against another, that such caution was intended for the good of the person to whom it was conveyed, or of some person in whom that person was interested, or for the public good, and that the caution should be conveyed by the proper means"[5]. But the conduct of the accused should not go beyond a legitimate desire to protect the interests of those to whom he made the imputation If the accused speaks about the complainant violently and publicly he would not be protected[6]

Cases.—Want of good faith.—The complainant, a Brahman, who had been put out of caste, was re-admitted by the executive committee of the caste after [illegible] of by the [illegible] months, [illegible] which the complainant was described as a *doshi*, or sinner, which signified that he was a person unfit to be associated with. The accused were charged with the offence of defamation. They pleaded privilege, and it was admitted that they had acted without malice. It was held that the accused had not acted in good faith, and that the publication was not, under the circumstances, privileged and protected by this exception[7]. U, a woman, left her first husband and contracted a secret [illegible]

several communications which elicited no reply from him. Thereupon, twelve of

[1] *Nagargi Trikamji*, (1894) 19 Bom. 340
[2] *Purshottamdas Ranchhodas*, (1907) 9 Bom. L. R. 1287.
[3] *Chrestien*, (1870) 2 N. W. P 473
[4] *Senthinathaiyar* v. *Gnanamuthu Nadan*, (1884) 1 Weir 594 [illegible] Mad. 214.

the villagers of the place published in a newspaper a notice which began by stating that "J having kept a concubine by name U has had offspring by her". It was held that they were guilty of defamation, for conceding that the allegations were made for the benefit of a portion of the public, still the accused had no privilege to disseminate them to a circle of readers wider than those who could possibly be interested in the allegations[1]. Where the accused published a circular purporting to say that at a *panchayat* held at a certain place it was resolved that the complainant who had been to England was not to be taken into caste and that those of their community, who associated with him, could be taken into the caste only on their undergoing a penance and on consenting to give up all connection with the complainant, and where it was found that no *panchayat* was actually held and the publication was not made in good faith, it was held that the accused was rightly convicted of the offence of defamation. The publication of the circular lowered the character of the complainant in respect of his caste as it represented the complainant to be one with whom to associate would entail excommunication on the members of his brotherhood associating with him[2].

Caution conveyed in good faith.—The accused, with a number of other persons at a caste meeting, passed a resolution to the effect that "the Nilgiri people do not belong to the caste" (to which the accused and the Mahrattas belonged), "but that the complainant seems to belong to the Rangari caste". It was admitted that the complainant was a Mahratta living on the Nilgiris. The members of the meeting arrived at this conclusion after making enquiries. The complainant had notice of the meeting and the resolution was recorded in a book kept by the caste *panchayat*. It was held that under the circumstances the accused were not guilty of defamation[3]. A person was put out of caste by a meeting of his caste fellows for having taken water from the hands of a certain other person. The accused told some members of the caste not to take water from the hands of the person outcasted as, if they did so, they would be liable to be excommunicated. It was held that the accused was protected by this exception and was not guilty of defamation[4].

PRACTICE.

Evidence.—Prove (1) that the imputation in question consisted of words, spoken or intended to be read, or of signs, etc.

Although it cannot be laid down "as a universal proposition, that in no case where the actual words used have not been proved a conviction for defamation by word of mouth cannot be maintained, it must be conceded that in the majority of cases it should be so...Where the question arises as to whether the words used were intended to harm or had the effect of harming the reputation, the Court must be put in possession not only of the words used, but also of the context in which they were used, in order to find the intention and the effect of the words. If the Court should accept, instead of the words and the context, the 'impression' (of the words used, and of the general conversation) 'left on the minds of the witnesses', it would be yielding its own duty to witnesses, with the result that the accused person will have no benefit of the opinion of the Court itself"[5]. In the same case, King, J., remarked (p. 330): "It is unnecessary to prove the exact words used by the accused, for the purpose of supporting a conviction for oral defamation. It is sufficient to prove the purport or substance of the defamatory imputations. No honest witness would profess to remember the exact words used by a person who has been speaking for even fifteen minutes. At the most he may remember some striking phrase or expression. But a witness' failure to recall the exact words

1 *Shivgowda*, (1901) 3 Bom. L. R. 188.
2 *Mukund Ram*, (1909) 6 A. L. J. 472.
3 *Salar Mannaji Row*, (1887) 1 Weir 614.
4 *Umed Singh*, (1923) 46 All. 64.
5 Per Mukerji, J., in *Colonel Bhola Nath*, (1928) 51 All. 313, 317.

used, or the exact context in which they were spoken, is immaterial, provided that [illegible] defamatory remarks"[1].

(4) That he made or published the same.

There must be evidence to show that the publication was made by the accused[2]. The prosecution must affirmatively prove that the defendant published the libel complained of. Admissions as to publication in the written statement of the accused cannot be used to fill up the gap in the prosecution evidence[3]. In a prosecution for libel the only evidence adduced of publication was that the particular issue of the journal containing the libel bore the statement that it was printed and published by the accused. The sworn complaint also stated that the accused published it, and the accused said in the lower Court in his written statement that what was published was a substantially true report without any malicious intention and he did not deny that he published the libel. It was held that there was no legal evidence of publication[4].

It is incumbent on the complainant to produce evidence to show that the accused made or published the imputation complained of notwithstanding the accused admits the publication when examined under s 342 of the Code of Criminal Procedure. A Magistrate is neither empowered under that section to put questions to the accused if the prosecution has not let in evidence implicating him in the offence nor is his statement admissible in evidence to fill the gap in the absence of such evidence[5].

On the prosecution of the editor of a newspaper for defamation by publishing a libel *in his paper, an attested copy of a declaration made by the editor* under s. 5 of Act XXV of 1867, to the effect that he was the printer and publisher of the newspaper was produced in evidence by the complainant. It was held that the declaration was prima facie proof of publication by the editor[6]. If the manuscript of a libel be proved to be in the handwriting of the accused, and it be also proved to have been printed and published, this is sufficient evidence to show that it was published by the accused, although there be no evidence given to show that the printing and publication were by the direction of the accused[7]. Publication is sufficiently proved by the production of a printed copy[8].

In the case of the [illegible] that in the ordinary course he [illegible] connection with the paper"[9], d[illegible]

(5) That he intended thereby to harm the reputation of the complainant, or that he knew or had reason to believe that it would do so The intention of the accused must be gathered from the document complained of as a whole[10]. [illegible] has to be inferred from the act itself.

The question of the physical and moral as distinguished from the legal character of the act of a person accused under this section is, like those which arise under other sections of the Code, one to be determined by considerations and in-

1 [illegible] All. [illegible]

2 [illegible]

3 [illegible]

4 [illegible]

5 [illegible]

8 *Soosai Naidu*, (1891) 1 Weir 579.

9 Per Fawcett, J., in *Manilal Harilal*, Crim. Rev. No. 160 of 1927, decided by Fawcett and Mirza, JJ., on November 14, 1927 (Unrep. Bom)

10 *Laidman* v. *Hearsey*, (1885) 7 All. 906.

11 *Kali Prasanna Kabyabisharad*, (1897) 1 C. W. N. 465.

ferences drawn from the common experience rather than from rules of legal construction[1].

It is not an error in law for a Judge to require the accused to prove several distinct imputations contained in a libellous article published by him with the same strictness with which he would be required to prove them if he were the defendant in a civil action[2].

Exceptions.—The exception to the section should be considered by the Court even if the accused does not specifically rely on them provided that the facts give rise to a consideration of these exceptions[3].

Truth as defence.—Where the accused intends to bring evidence to prove the truth of the defamatory matter, his advocate should cross-examine the complainant upon every matter upon which evidence is intended to be brought. If he does not do so, it is a subject of serious consideration whether he should subsequently be allowed to tender proof as to the material incidents of which he was not cross-examined[4]. The accused is entitled to call evidence to prove that the allegations are true, even though he has denied making such allegations[5].

Where the accused having publicly charged a woman with being pregnant by adultery, requested the Court to have the complainant, the woman, medically examined in order that the truth or falsehood of the matter alleged might be satisfactorily established. It was held that there was no law which empowered the Courts to order such an examination in such a case[6].

Good faith.—The authors of the Code say: "Whether an imputation be or be not made in good faith is a question for the Courts of law. The burden of the proof will lie sometimes on the person who has made the imputation, and sometimes on the person on whom the imputation has been thrown. No general rule can be laid down. Yet scarcely any case could arise respecting which a sensible and impartial judge would feel any doubt. If, for example, a public functionary were to prosecute for defamation a writer who had described him in general terms as incapable, the court would probably require the prosecutor to give some proof of bad faith. If the prosecutor had no such proof to offer, the defendant would be acquitted. If the prosecutor were to prove that the defendant had applied to him for money, had promised to write in his praise if the money were advanced, and had threatened to abuse him if the money were withheld, the court would, probably, be of opinion that the defendant had not written in good faith, and would convict him.

"On the other hand, if the imputation were an imputation of some particular fact, or an imputation which, though general in form, yet implied the truth of some particular fact which, if true, might be proved, the court would probably hold that the burden of proving good faith lay on the defendant. Thus if a person were to publish that a collector was in the habit of receiving bribes from the zemindars of his district, and were unable to specify a single case, or to give any authority for his assertion, the courts would probably be of opinion that the imputation had not been made in good faith.

"Again: if a critic described a writer as a plagiarist, the courts would not consider this as defamation without very strong proof of bad faith. But if it were proved that the critic had, like Lauder, interpolated passages in old books in order to bear out the charge of plagiarism, the court would doubtless be of opinion that he had not criticised in good faith, and would convict him of defamation"[7].

[1] *Pitamber*, (1879) Unrep. Cr. C. 140.
[2] *Kikabhai Parbhudas*, (1872) 9 B. H. C. 451.
[3] *Muhammad Gul* v. *Haji Fazley Karim*, (1929) 33 C. W. N. 446.
[4] *Dhum Singh*, (1884) 6 All. 220.
[5] *Abdul Aziz* v. *Fazal Rahman*, (1928) 30 Cr. L. J. 239.
[6] *Pudmon*, (1889) Unrep. Cr. C. 474, Cr. R. No. 33 of 1889.
[7] Note R, p. 184.

Relevant facts.—A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself[1].

A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true. The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue[2].

A is accused of defaming B by publishing an imputation intended to harm the reputation of B. The fact of previous publications by A respecting B, showing ill-will on the part of A towards B is relevant, as proving A's intention to harm B's reputation by the particular publication in question. The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B[3].

Admissibility of evidence.—A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved[4].

A and B separately sue C for a libel which reflects upon each of them. C in each case says that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither. A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant between B and C[5].

Evidence of the complainant having previously acted as alleged in the libel is admissible[6]. When defamation affects a person's general character then evidence of the general reputation of that person may be given to show that there was a reasonable ground for the imputation and thus to reduce the sentence[7]. The accused was convicted for having defamed a public servant by publishing an imputation that the latter had compelled him to pay a bribe in order to avoid a prosecution for a certain offence. The accused wanted to produce evidence as to [illegible] evidence as [illegible] Court. It [illegible] specific [illegible] evidence to show that the complainant had the reputation of being a bribe-taker[8].

Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Where a complaint shows that an imputation against the complainant's character has been made and that such imputation is prima facie defamatory, a Magistrate is bound to issue summons and is not at liberty to anticipate a case of privilege unless the privilege is distinctly admitted by the complainant[9]. The examination and cross-examination of the complainant should be held in the [illegible]

former section on the application of a person discharged or acquitted when the Court has refused sanction under the latter section[illegible]

[1] Indian Evidence Act, s 6, ill. (c)
[2] *Ibid*, s 9, ill (b)
[3] *Ibid*, s 14, ill (e).
[4] *Ibid*, s. 32, ill (n).
[5] *Ibid*, s. 43, ill (a).
[6] *Laidman v. Hearsey*, (1885) 7 All. [illegible]
[7] *Chedi Lal*, (1888) 2 C. P. L. R. [illegible]
[8] [illegible] 4 Lah. [illegible]
[9] [illegible]
[illegible] Chunder [illegible] 13 C. W. N. [illegible]
[illegible]

Jurisdiction.—Where the publication of the defamatory matter is outside British India, the British Courts have no jurisdiction to try the offence[1]. To maintain a prosecution for defamation in a particular Court, there must be a publication of the libel within the local limits of the jurisdiction of that Court. Where the alleged libel was said to be contained in a letter purporting to be written from Bangalore to England, it was held that to maintain a prosecution in the Bangalore Court, there must be evidence that the letter was handed over to somebody at Bangalore to be taken to the addressee or that it was posted at Bangalore[2].

Complaint by the aggrieved person is necessary.—No Court shall take cognizance of this offence except upon a complaint made by the person aggrieved[3]. Death of the complainant terminates the prosecution. A prosecution for defamation being essentially a personal action cannot be continued by the legal representatives of a deceased petitioner[4].

A charge of defamation not contained in the complaint presented to the Magistrate, but added subsequently by the Magistrate upon statements made by the complainant, is not a legal complaint made by the aggrieved person[5].

Husband.—A husband is entitled to be a complainant where the alleged offence is defamation imputing unchastity to his wife[6].

Brother.—A brother, with whom lived his widowed sister, a Hindu lady, is entitled to complain about the defamation of his sister[7].

Brother-in-law.—Where a person prosecuted another for defaming his sister-in-law, it was held that as there was no imputation made against the complainant there was no defamation of him, and his sister-in-law, being the person defamed, ought herself to have made the complaint[8].

President of a Municipality.—The president of a Municipality is not a 'person aggrieved' within the meaning of s. 198 of the Criminal Procedure Code by the defamation of his subordinate officers[9].

Official superior.—A complaint made not by the person aggrieved but by his official superior should not be accepted[10].

Sanction to prosecute a Judge for words uttered on the bench.—The Madras High Court has held that a complaint against a Judge who used defamatory language to a witness during the trial of a suit cannot be entertained by a Magistrate in the absence of the sanction of Government or the High Court under s. 197 of the Criminal Procedure Code[11]. Similarly, the former Chief Court of the Punjab held that a charge against a Munsiff of using defamatory language while he was sitting in his Court as a Judge and the complainant's case was actually before him could not be entertained by a Magistrate without the previous sanction of Government[12]. The Calcutta High Court has, however, decided, where a pleader applied for sanction to prosecute a Magistrate for using defamatory language towards him in

1 *Varnakote Illath Krishnan Nambudri,* (1900) 1 Weir 579.

2 *Burke* v. *Skipp,* (1923) 45 M. L. J. 754, 33 M. L. T. 168.

3 Criminal Procedure Code, s. 198.

4 *Ishar Das,* (1908) P. R. No. 10 of 1908; *Labouchere.* (1884) 12 Q. B. D. 320.

5 *Deokinandan,* (1887) 10 All. 39.

6 *Chhotalal Lallubhai* v. *Nathabhai Bechar,* (1900) 2 Bom. L. R. 665, 25 Bom. 151, F. B., overruling *Kustantin,* (1887) Unrep. Cr. C. 327; *Chellam Naidu* v. *Ramasami,* (1891) 14 Mad. 379; *Anantha Goundan,* (1904) 15 M. L. J. 224; *Basina Appanna* v. *Peta Akkanna,* (1924) 20 L. W. 921, 47 M. L. J. 746; *Gurdit Singh,* (1924) 5 Lah. 301. In *Daud,* (1884) P. R. No. 22 of 1884, the husband prosecuted the accused for defaming himself though the imputation was said to have been made concerning his wife and the former Chief Court of the Punjab held that the conviction could not be sustained.

7 *Thakur Das Sar* v. *Adhar Chandra Missri,* (1904) 32 Cal. 425.

8 *Lakshman,* (1888) Unrep. Cr. C. 392, Cr. R. No. 48 of 1888.

9 *Beauchamp* v. *Moore,* (1902) 26 Mad. 43.

10 *Gaya Barhai,* (1922) 4 U. P. L. R. (O.) 81.

11 *Gulam Muhammad Sharif-ud-daulah,* (1886) 9 Mad. 439.

12 *Amir Singh,* (1904) P. R. No. 29 of 1904

the course of a trial of a case, that no such sanction was necessary, unless the Judge or public servant committed an offence in his judicial or official capacity[1].

Sections 182 and 500.—A complaint of defamation cannot be dismissed on the technical ground that the offence of defamation charged merged in an offence punishable under s 182 and that no sanction was obtained for the prosecution under the latter section as required by s. 195, Criminal Procedure Code[2]. An acquittal on a charge of giving false information to a public servant, under s. 182, on the ground that the person to whom the information was given was not a public servant, is no bar to a trial under s 500 for defamation[3]. The refusal of an application for sanction to prosecute a party to a judicial proceeding, under ss. 182 and 193, is not a bar, under s. 403, Criminal Procedure Code, to his prosecution for defamation[4].

Sections 211 and 500.—Where an offence, though described as an offence under s. 500, still remains an offence "punishable" under s. 211, process should not issue under the former section on the application of a person discharged or acquitted, when the Court has refused sanction under the latter section[5]

Petition containing defamatory allegations against a Magistrate may be

and ordered it to be returned[7].

Punishment.—Where abusive words were used by a person about another ... place between them, the ... ere there is no substan- ... unreserved terms may ...

The mere circumstance that the accused is not the writer of the article or is a dummy editor is no ground by itself for reduction of the sentence Ordinarily,

Charge.—In framing a charge it is not necessary to negative the exceptions contained in this section[10] But the charge should specify directly the persons whose reputation is injuriously affected[11]. It must set forth the particular occasions on which the defamation was said to have been committed, so as to give the accused an opportunity of defending himself with reference to each act alleged to have been committed by him[12].

It should run thus —

I (*name and office of Magistrate, etc*,) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, defamed AB, by making or publishing to CD a certain imputation concerning the said AB, to wit (*state the*

[1] *Nardo Lal Basak* v. *Miller*, (1899) 26 Cal 852. See *Purshram Keshav*, (1870) 7 B H C. (Cr. C.) 61 and *Lakshman Sakharam*, (1877) 2 Bom. 481

[2] *Krishna Row* v *Appasawmi Aiyar*, (1891) 1 Weir 585

[3] *Ramshebak Lal* v *Muneswar Singh*, (1910) 37 Cal 604

... 451.

[11] Weir, 3rd Edn. ...

[12] *Bishwanath* ... v. *Kalab Gazi* ... (1902) 30 Cal. ... *Hakemed*, ... Cr L J 1922

defamatory matter), by means of spoken words [*or* writing *or* signs *or* visible representations], intending to harm, or knowing or having reason to believe that such imputation would harm the reputation of the said AB; and you thereby committed an offence punishable under s. 500 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Printing or engraving matter known to be defamatory.

501. Whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

COMMENT.

This is a distinct offence from the one under s. 500[1]. The person printing or engraving defamatory matter abets the offence. This section makes such abetment a distinct offence.

Ingredients.—This section requires two things:—

1. Printing or engraving any matter.
2. Knowledge or reason to believe that such matter is defamatory.

PRACTICE.

Evidence.—Prove (1) that the matter in question is defamatory (*vide* s. 499).

(2) That the accused printed or engraved it.

(3) That when he did so he knew or had reason to believe that such matter was defamatory.

Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Destruction of libellous matter.—On a conviction under this section the Court may order the destruction of all the copies of the thing in respect of which the conviction was had, and which are in the custody of the Court or remain in the possession or power of the person convicted[2].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, printed or engraved some matter, to wit——, knowing or having good reason to believe that the same was defamatory, and that you thereby committed an offence punishable under s. 501 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* High Court)].

And I hereby direct that you be tried [by the said Court (*if the case is tried by a Magistrate omit these words*)] on the said charge.

Sale of printed or engraved substance containing defamatory matter.

502. Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section supplements the provisions of the previous section by making the seller of defamatory matter punishable under it.

1 *Uma Shankar*, (1889) P. R. No. 18 of 1889. 2 Criminal Procedure Code, s. 521 (1).

Ingredients.—This section has two essentials:—

1. Selling or offering for sale any printed or engraved substance.
2. Knowledge that such *substance contains defamatory matter.*

"It is, no doubt, necessary in order to substantiate a charge under s. 502 to prove that the seller of a printed substance knows its contents, which imports proof that he understands the language used, and to prove that its contents are defamatory, but there appears to be no need, if the contents are defamatory, to prove further that he knows them to be defamatory. In cases where it is necessary to prove against a person that he has committed defamation by publishing an imputation, when the matter published is *per se* defamatory, all that the prosecution is bound to prove, in the first instance, is the fact of publication. When the tendency of the imputation published concerning any person, is to harm the reputation of that person, a Court is fully justified in inferring from the terms of the matter itself that the publisher intended to harm or knew or had reason to believe that such imputation would harm his reputation But is there no *mens rea* in the definition of the offence falling under s. 502? The definition requires knowledge that the printed substance sold contains defamatory matter. A person who conducts a business in the course of which he is liable to sell books or papers, or the like, which may contain matter which is injurious to the reputation of another person, and may be in fact defamatory as defined in the Penal Code, is bound by reason of the penalty imposed by this section, if not otherwise, to abstain from
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stand the English law on the subject, in a better position than persons in England, who, in the course of their business, sell books or paper containing defamatory matter, for the latter are liable criminally as well as civilly, whether or not they know the contents of the printed substance sold"[1].

PRACTICE.

Evidence.—Prove (1) that the matter is defamatory (*vide* s. 494).

(2) That it is printed or engraved on the substance in question.

(3) That the accused sold, or offered for sale, that substance

(4) That he then knew that it contained such defamatory matter.

Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Destruction of libellous matter.—See s 521, Criminal Procedure Code.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the ——day of——, at——, sold or offered for sale any printed (or engraved) substance, to wit——, containing defamatory matter

[1] Per Plowden, J., in *Sardar Dayal Singh*, (1891) P. R. No. 8 of 1891, pp. 25, 26.

CHAPTER XXII.

OF CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE.

Criminal intimidation.

503. Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested[1], with intent to cause alarm to that person or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat[2], commits criminal intimidation.

Explanation.—A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.

ILLUSTRATION.

A, for the purpose of inducing B to desist from prosecuting a civil suit threatens to burn B's house. A is guilty of criminal intimidation.

COMMENT.

Criminal intimidation is closely analogous to extortion. In extortion, the immediate purpose is filthy lucre by obtaining money or money's worth; in criminal intimidation, the immediate purpose is to induce the person threatened to do, or abstain from doing, something which he was not legally bound to do or omit.

Ingredients.—This section has the following essentials:—

1. Threatening a person with any injury
   (*i*) to his person, reputation, or property; or
   (*ii*) to the person or reputation of any one in whom that person is interested.
2. The threat must be with intent
   (*a*) to cause alarm to that person, or
   (*b*) to cause that person to do any act which he is not legally bound to do as the means of avoiding the execution of such threat, or
   (*c*) to cause that person to omit to do any act which that person is legally entitled to do as the means of avoiding the execution of such threat.

1. "Threatens another with any injury to his person, reputation or property, etc.'—The gist of the offence is the effect which the threat is intended to have upon the mind of the person threatened, and it is equally clear that before it can have any effect upon his mind it must be either made to him by the person threatening or communicated to him in some way. The threat referred to in this section must be a threat communicated, or uttered with the intention of its being communicated, to the person threatened for the purpose of influencing his mind[1].

The question whether the threat amounts to a criminal intimidation or not, does not depend on the nerves of the individual threatened; if it is such a threat as may overcome the ordinary free will of a firm man, or whatever the nature of the threat, if it is made with the intention mentioned in the section, it is an offence[2].

[1] *Gunga Chunder Sen* v. *Gour Chunder*, (1888) 15 Cal. 671, 673.

[2] M. & M. 540.

The threat need not be addressed to the prosecutor direct. It is sufficient if the threat, though addressed to third parties, was intended to reach the prosecutor as the party threatened[1], e g , threat to a person's pleader[2]. A communication by a person that he is going to take revenge by false complaints cannot amount to threat or criminal intimidation A threat, in order to be indictable, must be made with intent to cause alarm to the complainant[3]. To advise others not to deal with a man is an injurious act but does not amount to a threat, and the harm caused thereby is not to property already possessed by that man but rather to his opportunities of future gain[4].

'Injury'.—See s 44, *supra* There can be no criminal intimidation where the injury of which complaint is made is the hardship arising from a conventional punishment which a spiritual superior, acting in the exercise of his authority as regulated by the custom of the caste, is competent to inflict[5] The harm threatened must be illegal[6] A certain President of a self-constituted Arbitration Court caused a notice to be issued over his signature to a certain person requesting the latter to be present on a given date and arrange for amicable settlement of a certain claim. The notice concluded with the statement that if the defendant did not give an answer (or file a written statement) on that date, the suit would be decreed *ex parte* It was held that a threat of a decree is a threat of harm to an individual in his person, reputation or property That the tribunal is incompetent to execute its decree is immaterial. This section says nothing about the capacity of the person making the threat to carry it into execution Nor does the section say anything about the effect upon the person threatened, and whether or not the complainant knew that the notice was innocuous is equally immaterial Under s 44, injury denotes harm illegally caused. By no legal process or means could this tribunal make or give effect to such a decree as it was the intention of the notice to cause the complainant to believe would be made if he failed to comply with it Therefore, in that the notice threatened the complainant with such a decree, it threatened the complainant with harm to be caused illegally The accused was, therefore, held guilty of the offence of criminal intimidation[7]

'Person'.—That is, the individuality of a human being , individual character or station ; bodily form or substance

'Reputation'.—That is, credit, honour, character, good name[8].

'Or to the person or reputation of any one in whom that person is interested'. —In the case of injury to a third person in whom the person threatened is interested, the injury should be to his person or reputation Injury to the property only of the third person does not come within the purview of the section, though injury to the property of the person threatened does

2. 'Intent to cause alarm to that person or to cause that person to do any act which he is not legally bound to do, or to omit to do any act ...as the means of avoiding the. .threat'.—The threat must be with intent to cause alarm to that person or to cause that person to do or omit to do any act as the means of avoiding the execution of such threat. See s. 43 for the meaning of 'legally bound to do'.

1 (1865) 1 Weir 622; *Palani Goundan,* (1892) 1 Weir 623

2 *Syed Mahomed* v *Sarvarkhan,* (1882) 5 C. P. L R. 50.

3 *Govind Raoji Thousar,* (1900) 2 Bom. L. R. 55.

4 *Ghisa Mal,* (1888) 1 O D. 215.

5 *Sri Vidya Sankara Narasimha Bharathi Guruswamulu,* (1883) 6 Mad. 381

6 *Nga Shwe Waing,* (1900) 1 U. B R. (1897-1901) 359.

7 *Priyanath Gupta* v. *Lalji Chowkidar,* (1923) 27 C W. N. 479.

8 Wharton, 13th Edn , p. 742

CASES.

Threat of vengeance.—A constable was sent to fetch to a Police Inspector some persons from whom the latter wished to make inquiries regarding an offence. While the constable was taking two persons with him, the accused came up and threatened them both and the constable with the Head Constable's vengeance, and as a consequence the two persons refused to accompany the constable who had to go without them. It was held that the accused had committed this offence[1].

Threat of excommunication.—Where the accused told the complainant, a member of their caste, that he should give up his field or else they would put him out of caste, it was held that this offence was not committed[2].

Threat to kill a person.—Where the accused and his brother having had a quarrel, the former ran off and fetched a sword, but was seized by other persons and was disarmed and he then asserted his intention of killing his brother if he was let go, it was held that the words used by the accused could not be construed into a threat within the meaning of this section[3].

Threat to get a person imprisoned.—Where the accused went to the complainant, a brother of an adult woman, and told him that he had come from the Government, and would get him six months' imprisonment if he did not let his sister go, it was held that those words did not constitute an offence under this or any other section[4]. But where a person held out threats to several persons to get them implicated and imprisoned if they kept to the terms of an *ikrarnama* (entered into by parties to keep the peace during *Moharram* festival), he was held to have committed this offence[5].

Threat to get a person dismissed.—Where the accused held out a threat of getting a Head Constable of police dismissed from service, it was held that this did amount to a threat of injury as was punishable under this section[6].

Threat to ruin another by cases.—Where the accused who threatened to ruin the complainant by cases was convicted of criminal intimidation, it was held that the conviction could not stand. The Court said that had the threat been to ruin the complainant by false cases, the offence would have been committed; but as the threat was to ruin him by cases, it could not be assumed that by cases was meant false cases[7]. A threat by a person, who was called upon to pay house-tax under a warrant for the attachment of his brother's property, that he would take legal steps, was held to be not a threat of injury as defined in the Code[8].

Compelling a public servant by threats to draw up a false document.—Where the accused in offering resistance to a police-officer compelled him to draw up a document to the effect that a search was conducted and nothing incriminating was found, it was held that they were guilty of an offence under this section[9].

Person informed about threatened injury to another must be interested in that other person.—The accused sent a fabricated petition to the Revenue Commissioner S. D., containing a threat that, if a certain Forest Officer were not removed elsewhere, he would be killed. It was found that the Commissioner had neither official nor personal interest in the Forest Officer. It was

1 *Purshotam Vanamali*, (1896) Unrep. Cr. C. 850, Cr. R. No. 18 of 1896.

2 *Alya Dhurma*, (1870) Unrep. Cr. C. 37, Cr. R. August 17, 1870; *Fakirappa*, (1882) Unrep. Cr. C. 186.

3 *Data Ram*, (1882) P. R. No. 45 of 1882.

4 *Moroba Bhaskarji*, (1871) 8 B. H. C. (Cr. C.) 101.

5 *Ata Husain*, (1885) 6 A. W. N. 41.

6 *Dada Hanmant Dani*, (1895) 20 Bom. 94.

7 *Jowahir Pattak* v. *Parbhoo Ahir*, (1902) 30 Cal. 418, 7 C. W. N. 116; *Chitraputtra Pillai* v. *Parvathi*, (1896) 1 Weir 623.

8 *Dayabhai Narottamdas*, (1906) Crim. Ref. No. 67 of 1906. Cor. Batty and Heaton, JJ., decided on November 22, 1906 (Unrep. Bom.)

9 *Nirmal Singh*, (1919) 17 A. L. J. 1047.

held that, as the person to whom the petition was addressed was not interested in the person threatened, the act intended and done by the accused did not amount to criminal intimidation[1]. A threat to commit suicide is not within the section unless the other person be interested in the person making the threat[2].

504. Whoever intentionally insults[1], and thereby gives provocation to, any person[2], intending or knowing it to be likely that such provocation will cause him to break the public peace[3], or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Intentional insult with intent to provoke breach of the peace.

COMMENT.

Object.—An imputation not defamatory may be uttered in the hearing of the person who is the object of it, for the purpose of provoking that person to break the public peace If so, it is punishable under this section A person also comes within the ambit of the section if the provocation offered by him is of such a character as to cause the person provoked "to commit any other offence"[3] The authors of the Code observe: "There are many cases in which it is fit that unpleasant truth should be told respecting an individual But there is no case in which it is desirable that such truth should be told in such a way that the telling of it is a gross personal outrage. A person who has detected, or thinks that he has detected, a *dishonest misrepresentation in a book has a right to expose it publicly* But he cannot be allowed to intrude into the presence of the author of the book, and to tell him to his face that he is a liar. A person who knows the mistress of a female school to be a woman of infamous character deserves well of society if he states what he knows. But he cannot be allowed to follow her through the streets calling her by opprobrious names, though he may be able to prove that all those names were merited. A person who brings to notice the malversation of a public functionary deserves applause But a person who hangs a public functionary in effigy at that functionary's door, with an opprobrious label, does what cannot be permitted, even though every word on the label, and every imputation which the exhibition was meant to convey, may be perfectly true"[4]

This section provides a remedy for using abusive and insulting language[5].

Section 499 and 504.—The difference between an offence under s. 504 and s 499 lies in the fact that in the latter publication to the prosecutor alone is not sufficient, as such an imputation could not be said to harm the reputation of the person; but according to the former this would be a complete offence Section 504 corresponds precisely with those cases in which, under the English law, defamatory matter published to the prosecutor alone would be indictable as libellous.

Ingredients.—This section requires:—

1. Intentional insult.
2. The insult must be such as to give provocation to the person insulted.
3. Intention that such provocation should cause, or knowledge that such provocation was likely to cause, the person so insulted to break the public peace or to commit any other offence

[1] *Mangesh Jivaji*, (1887) 11 Bom 376
[2] *Nubi Buksh* v *Must. Oomra*, (1866) P. R No 109 of 1866, *Chikati Gururadu*, (1881) Weir (3rd Edn) 390
[3] *Gul Muhammad* v. *Akbar Ali*, (1926) 28 Cr L J. 172; *Vaz* v. *Dias*, (1929) [illegible] Bom. L R. 103
[4] Note R, p 185.
[5] See *Girish Chunder* [illegible] *Sadukhan*, (1899) 26 C[illegible]

1. **'Intentionally insults'.**—There is nothing in this section which confines the "insult" to spoken words as distinguished from words written in a letter[1]. An "insult" is no less intentional because it is incidental to another insult or even to another statement or proceeding which is not insulting. But to insult another is not an offence unless the offender intends by that insult to provoke the other person into breaking the public peace, by assaulting him or getting him assaulted or reviling him in loud or angry tones or in any other way, or at least knows that such a disturbance is a probable result of his insult[2]. The word 'insult' signifies, to treat with offensive disrespect, to offer indignity to. Such insult may be inferred not merely from the words used, but also from the tone and manner in which the words are spoken[3]. If the insult alleged consisted of spoken words only, it would be essential that the words should be stated in order to ascertain whether or not the words so used would constitute an insult to the mind of an ordinary person, but insult may arise out of the conduct or action of a man, irrespective of spoken words[4]. The section refers to an insult intentionally inflicted and which was likely to result in a breach of the peace[5]. As to what constitutes an insult depends on the calm, dispassionate opinion of the Judge, whether the act complained of, from its nature and attendant circumstances, was calculated to insult, and was done with intent to insult, the complainant, and it did not depend on the sensitive feelings of the complainant. The offence is not made to depend upon the sensitive feelings or excitable temper of the person insulted, but on the intention or knowledge of the offender. Whatever the previous provocation, a man who pulls the beard of a Mahomedan in a public street, intentionally insults him and thereby causes him provocation, knowing that such provocation is likely to cause a breach of public peace[6].

2. **'Thereby gives provocation to, any person'.**—It is sufficient if the insult is of a kind calculated to cause the other party to lose his temper and say or do something violent. The public peace can be broken by angry words as well as by deeds[7].

3. **'Intending or knowing it to be likely that such provocation will cause him to break the public peace'.**—Mere abuse will not do without an intention to cause breach of the peace or knowledge that a breach of the peace is likely[8]. The law makes punishable the insulting provocation which, under ordinary circumstances, would cause a breach of the peace to be committed, and the offender is not protected from the consequences of his act because the person insulted does not accept the provocation in the manner intended. Where, therefore, A abused B to such an extent as to reduce B to a state of abject terror, it was held that A having given to B such provocation as would, under ordinary circumstances, have caused a breach of the peace, was guilty of this offence[9]. The insult again may be of such a character that a person of ordinary temperament would not complain of the abuse and the abuse might come within the terms of s. 95[10].

If the provocation is not of such a character as to cause the person provoked to break the public peace or to commit any other offence no offence under this section is committed. Where a furniture dealer was alleged to have insulted a

1 *Vaz* v. *Dias*, (1929) 32 Bom. L. R. 103.
2 Per Hallifax, A. J. C., in *Siffless* v. *Dixit*, (1923) 25 Cr. L. J. 1079.
3 *Jaykrishna*, (1916) 24 C. L. J. 137, 138, 21 C. W. N. 95, 97.
4 *Habib Khan* v. *Mazharul Haque*, (1917) 1 P. L. W. 536.
5 *Moti Lal*, (1901) 24 All. 155.
6 *Bhagwan Das* v. *Saddiq Ahmad*, (1924) 23 A. L. J. 73.
7 *Chunibhai Dahyabhai*, (1902) 5 Bom. L. R. 78.
8 *Kuppuswami Aiyar*, (1915) 39 Mad. 561.
9 *Jogayya*, (1887) 10 Mad. 353; *Sooraparazu Singayya*, (1894) 1 Weir 621; *Syed Mahomed*, (1900) 1 Weir 622; *Mi Te*, (1894) 1 U. B. R. (1892-1896) 290.
10 *Vaz* v. *Dias*, (1929) 32 Bom. L. R. 103.

European lady customer by not getting up when she entered into the shop and by refusing to give her some pieces of furniture which her husband had on the previous day asked him to supply on hire, it was held that although his conduct might be very discourteous, rude, and insolent, yet that could not be sufficient to bring him within the purview of this section[1].

CASES.

Refusal to have social intercourse.—A complaint by certain Hindu [illegible] t the [illegible] any [illegible] wells used by the Hindus, was held not to be maintainable under this section[2].

Abuse.—A Police Constable asked the complainant not to create any disturbance on a public road Upon the complainant's declining to do so, he demanded his name and address, which were not given The Constable thereupon called the complainant *soowar*, and arrested and dragged him to the police-station and detained him there till his name and address were ascertained It was held that the Constable was guilty of an offence under this section[3]. Where the accused used the expression *pelhe moonha se bako* (blurt out first) to a police-officer who had been ordered by the District authorities to serve notices upon the shop-keepers of a certain bazaar, and who attempted to serve a notice on the accused, it was held that as the use of the expression was intentionally insulting and likely to provoke a breach of the peace, the accused was guilty of this offence[4] To use the word "go to hell" to a person after an altercation with him amounts to this offence[5] Calling a man "beiman" and "badmash" constitutes an offence under this section[6], but calling an *arora* a *Kirar*, on provocation, is not such an offence[7].

The accused was digging earth from a tank whereupon the complainant having objected, the accused filthily abused him The accused was tried for an offence under this section, and his defence was that the tank was in his possession and belonged to him. The Magistrate held that the complainant had failed to prove his possession of the disputed tank and therefore "the accused was justified under s. 104, Penal Code, in voluntarily causing the harm, i e, using abusive language" to the complainant; and acquitted the accused but the acquittal was set aside and a re-trial was ordered[8].

Where the accused deliberately, i e., intentionally, set themselves to prevent the complainant from irrigating his land, and when remonstrated with, offered abuse and threatened to strike, it was held that although the words of abuse were not set out, an offence under this section was made out, the threat to strike was a threat conveying an intention on the part of the accused that they were desirous of provoking a breach of the peace and amounted to the offering of an insult[9].

Where the accused wrote an insulting letter to the complainant who was away in another town, it was held that no offence was committed, for it was highly improbable that the complainant would travel a journey in order to create a disturbance[10].

1 *Rahim Baksh*, (1920) 18 A. L. J. 515.

2 *Ramditta* v. *Kirpa Singh*, (1882) P. R No. 3 of 1883.

3 [illegible] 507 [illegible] Bom.)

6 *Bakthawar Lal*, (1922) 4 L L. J. 481.

7 *Muhammad Bakhsh*, (1922) 23 Cr. L J. 171.

8 *Rakhal Das Roy* v *Kailash Banu*, (1909) 11 C. L. J. 113

9 *Habib Khan* v. *Mazharul Haque*, (1917) 1 P. L. W. 536.

10 *Sifles* v. *Dixit*, (1923) 25 Cr L. J 1079.

PRACTICE.

Evidence.—Prove (1) that the accused insulted some person.

(2) That he did so intentionally.

(3) That he thereby gave provocation to that person.

(4) That he intended, or knew that it was likely, that such provocation would cause that person to break the public peace, or to commit any other offence.

Procedure.—Not cognizable—Warrant—Bailable—Compoundable —Triable by any Magistrate—Triable summarily.

Charge.—The failure of the Magistrate to specifically mention the objectionable words in the charge does not vitiate the trial where the accused has not in any way been prejudiced by such omission[1].

The charge should run thus:—

I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, intentionally insulted and thereby gave provocation to——, intending (*or* knowing it to be likely) that such provocation will cause the said person to break the public peace (*or* to commit the offence of——), and thereby committed an offence punishable under s. 504 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Statements conducing to public mischief.

505. Whoever makes, publishes or circulates any statement, rumour or report,—

(*a*) with intent to cause, or which is likely to cause, any officer, soldier, sailor or airman in the Army, Navy or Air Force of Her Majesty or in the Royal Indian Marine or in the Imperial Service Troops to mutiny or otherwise disregard or fail in his duty as such ; or

(*b*) with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State[1] or against the public tranquillity[2]; or

(*c*) with intent to incite, or which is likely to incite, any class or community of persons to commit any offence[3] against any other class or community ;

shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Exception.—It does not amount to an offence, within the meaning of this section, when the person making, publishing or circulating any such statement, rumour or report has reasonable grounds for believing that such statement, rumour or report is true and makes, publishes or circulates it without any such intent as aforesaid[4].

COMMENT.

This section was substituted by Act IV of 1898. The Select Committee in their Report said: "We have inserted the clause proposed by the Government, but we have altered and enlarged the scope of the exception to the clause. No

[1] *Shankar Lal,* (1927) 28 Cr. L. J. 821.

doubt the statements, rumours and reports referred to are of a highly mischievous character, but, having regard to the conditions, under which modern journalism and the discussion of public questions are necessarily carried on, we think that, when the statement, rumour or report is published without any criminal intent, it is going too far to require the person who published it to prove its actual truth. To require such proof might be throwing an impossible burden upon him, and it should be sufficient for him to show that he had reasonable grounds for believing it, as for instance, by showing that he made due inquiry before he published it"[1].

In explaining the scope of this section, the Law Member in charge of the Bill said: "In s 505 the Select Committee have made a considerable modification. As the clause now stands, I think it need cause no apprehension to any speaker or journalist who acts in good faith It must be borne in mind that the clause does not strike at mischievous and mendacious reports generally It is aimed only at reports calculated to produce mutiny or to induce one section of the population to commit offences against another. If a man takes upon himself to circulate such a report, he surely cannot complain if he is asked to show that his intentions were innocent, and that he had reasonable grounds for believing the report"[2].

This section instead of being inserted in Chapter VII, which deals with offences relating to the Army, Navy, or Air Force appears in this Chapter, apparently because the repealed section contained some of the provisions contained in the present section and was not limited to offences relating to the Army, Navy or Air Force.

1. 'Offence against the State'.—See Chapter VI, ss 121-130 A tea estate [illegible] circulated a report among the [illegible]een the British Government and [illegible] the frontier, and that the coolies would be killed by the British. The effect of the report was that about 150 coolies ran away. The conviction of the *duffadar* under cl (*b*) was set aside as the coolies were not induced to commit an offence against the State or against the public peace[3].

2. 'Against the public tranquillity'.—See Chapter VIII, ss. 141-160.

3. 'Offence'.—See s. 40, *supra*.

4. 'Without any such intent as aforesaid'.—If the statement, rumour, or *report is true and is published without any such intent as is specified in cl.* (*a*), (*b*) or (*c*) a conviction cannot lie Where the writer of an article complained in a sober language free from exaggeration and incisive comments for the consideration of public officers and others concerned with a view to their taking necessary action to prevent a repetition of what had previously taken place and the article *contained no such statement, expression or comment*, as might fall within the purview of this section, it was held that he could not be convicted[4].

Amendment.—The words "or airman" and "or Air Force" were inserted by Act X of 1927.

PRACTICE.

Evidence.—Prove (1) that the accused made, published or circulated the statement, rumour, or report, in question.

(2) That he did so with intent to cause, or which was likely to cause, some officer, soldier sailor, or airman, to mutiny or otherwise disregard or fail in his duty as such

(3) That *such officer, soldier, sailor*, or airman belonged to the Army, Navy or Air Force of His Majesty, or to the Royal Indian Marine, or to the Imperial Service Troops.

[1] *Gazette of India*, 1898, Part V, p. 14
[2] *Gazette of India*, 1898, Part VI, p 26
[3] *Manbir*, (1898) 3 C. W. N. 1.
[4] *Gupta*, (1924) 6 L. L. J. 162.

Word, gesture or act intended to insult the modesty of a woman.

509. Whoever, intending to insult the modesty[1] of any woman, utters any word, makes any sound or gesture, or exhibits any object[2], intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman[3], shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

COMMENT.

Ingredients.—This section requires the following essentials:—

1. Intention to insult the modesty of a woman.
2. The insult must be caused

(i) by uttering any word, or making any sound or gesture, or exhibiting any object intending that such word or sound shall be heard or that the gesture or object shall be seen by such woman, or

(ii) by intruding upon the privacy of such woman.

1. 'Intending to insult the modesty of any woman'.—This section makes intention to insult the modesty of a woman the essential ingredient of the offence[1]. There must be some individual woman or women whose modesty has been outraged. It does not require the woman, whose modesty it is intended to insult, to have either heard the word or seen the action. The intention of the offender that she should see or hear is all that is required. The law allows such intention to be presumed. It will be enough if it is proved like any other fact (and the existence of intention is a fact) by the evidence of conduct and of surrounding circumstances[2]. If a man attempts to attract the attention of a woman persistently and publicly and by unusual methods, thereby causing resentment and annoyance, he is very close upon insulting the woman.

The word 'modesty' does not lead only to the contemplation of sexual relationship of an indecent character. The section includes indecency, but does not exclude all other acts falling short of downright indecency.

If a man, intending to outrage the modesty of a woman, exposes his person indecently to her, or uses obscene words intending that she would hear them or exhibits to her obscene drawings, he commits this offence. If such an act is done in a public place it will amount to public nuisance. If it amounts to an assault it will be punishable under s. 354.

2. 'Exhibits any object'.—The word 'exhibit' ordinarily expresses the idea of actually showing a thing to a person. On the other hand, such showing need not be immediate. 'Exhibit' was practically equivalent to the word 'expose', and a thing can be exhibited or exposed to a person, although at first it may be wrapped in something which prevents that person from actually seeing the object contained in the wrapper[3]. 'Exhibits' means 'displays or causes to be seen' at a place not necessarily a public place[4]. Sending by post a letter containing indecent overtures to a woman comes within the words "exhibits any object"[5].

3. 'Intrudes upon the privacy of such woman'.—To constitute intrusion upon the privacy of a woman, the intruder must be "intending to insult the modesty of such woman". The opening words of the section relate to and qualify each one of the acts subsequently mentioned in the section[6].

1 *Phiaz Mahamad*, (1903) 5 Bom. L. R. 502.

2 *Balmakand Ram* v. *Ghansamram*, (1894) 22 Cal. 391.

3 Per Fawcett, J., in *Tarak Das Gupta*, (1925) 28 Bom. L. R. 99, 8 Bom. Cr. C. 222.

4 Per Madgavkar, J., in *ibid.*

5 *Ibid.*

6 *Hopper*, (1892) P. R. No. 6 of 1892; *Lajje Ram* (1898) P. R. No. 12 of 1898; *Phiaz Mahamad*, sup.

A man can intrude on the privacy of a woman in a public place. Every one carries about with him, even in public, his own privacy, whether it be of thought or person No one can break in upon another's reflections and society without intruding upon his privacy. It is usual among polite people to beg pardon for doing so.

If the intrusion upon the woman's privacy is by entering her house or rooms, etc., the offence will fall within the definition of 'criminal trespass'.

CASES.

Intrusion upon privacy.—The accused in the middle of the night effected an entry in a room occupied by four women On an alarm being given and an attempt made to capture him he escaped He was charged with an offence under s. 456 of the Code. It was held that the act of the accused amounted to an intrusion on privacy within the meaning of this section, and that, therefore, the intent to commit an offence within the meaning of s. 441 was made out[1] Where the accused entered in the middle of the night, into the room of the complainant, with whom he had previous acquaintance and who used to speak to strangers and give *pan supari* to visitors, it was held that this offence was not committed[2]

The accused followed in his carriage the complainant's unmarried daughter at various places, and laughed and grinned and stared at her while passing and [illegible] l so on The [illegible] High Court, [illegible] draw subtle distinctions to show that these acts do not amount to outraging the modesty of a woman and encroaching upon her privacy. Especially in this country, where women are trying to come out in public, it would be making a farce of the law, if we were to say that the conduct of the appellant did not amount to an offence and that the Magistrate has taken an incorrect view of the section of the Indian Penal Code under which the accused has been convicted and sentenced"[3] These observations were quoted with approval in a recent case in which the accused, a University graduate, sent by post to the complainant, an English nurse, a letter containing indecent overtures and suggesting that the complainant should take certain action in order to show whether she accepted the terms mentioned in the letter. The complainant informed the Police, and in consequence of what they did, the accused was found to be the person who had sent the letter. It was held that in the circumstances an inference arose that the accused intended to insult the modesty of the complainant[4].

PRACTICE.

Evidence.—Prove (1) that the accused uttered the words, or made the sound or gestures, etc., in question.

(2) That such word, sound, or gesture was intended by the accused to be heard or seen by some woman.

(3) That he thereby intended to insult the modesty of that woman.

There must be some individual woman whose modesty has been outraged [illegible] woman or women should herself or themselves make a [illegible][5].

[1] *Premanundo Shaha* v. *Brindabun Chung*, (1895) 22 Cal. 994, *Balmakand Ram* v. *Ghansamram*, (1894) 22 Cal 391

[2] *Phiaz Mahamad*, (1908) 5 Bom L. R. 502

[3] *Mahomad Kassam Chisty*, (1911) Criminal Appeal No. 454 of 1910, decided on January 15, [illegible] Chandavarkar [illegible] Heaton, JJ. [illegible]

[4] *[illegible]* (1925) 28 Bom. [illegible] 99, 8 Bom. [illegible]

[5] *[illegible]* (1924) 19 S. L. [illegible] 26 Cr. L. J. [illegible]

Or prove—
(1) That the accused intruded upon the privacy of some woman.
(2) and (3) as above.

Procedure.—Not cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Presidency Magistrate, or Magistrate of the first class.

Charge.—The charge should run thus:—

I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, intending to insult the modesty of AB uttered the words, to wit——(*or* made some sound or gesture, to wit——*or* exhibited some object, to wit——) intending that the same shall be heard (*or* seen) by the said AB and that you thereby committed an offence punishable under s. 509 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Misconduct in public by a drunken person.

510. Whoever, in a state of intoxication, appears in any public place, or in any place which it is a trespass in him to enter[1], and there conducts himself in such a manner as to cause annoyance to any person[2], shall be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to ten rupees, or with both.

COMMENT.

The immunity from punishment which the Code, through motives of humanity and justice, allows to persons mentally affected, is not extended to him who commits an offence through drunkenness; he shall not be excused, becaue his incapacity arose from his own default, but is answerable equally as if he had been when the act was done, in the full possession of his faculties, a principle of law which is embodied in the familiar adage, *qui peccat ebrius luat sobrius* (let him who sins when drunk be punished when sober).

Under the Police Act[1] cases of drunkenness are often punished, and the provisions of this section are rarely applied.

Ingredients.—This section requires two essentials:—

1. Appearance of a person in a state of intoxication in
   (*i*) any public place, or
   (*ii*) any place which it is a trespass in him to enter.
2. The person so appearing must have conducted himself in such a manner as to cause annoyance to any person.

1. 'In a state of intoxication appears in any public place, or any place which it is a trespass in him to enter'.—The person must be in a state of intoxication caused by liquor or other drinks or drugs. As to the meaning of 'public place', see s. 294; and as to 'trespass', see. s. 411.

2. 'Conducts himself in such a manner as to cause annoyance to any person'.—Mere intoxication is not made punishable. It is only when a person appears, in a state of drunkenness, in a public place, as in a street, or goes to a place where he has no right to go, and causes annoyance to the people, that he commits this offence.

PRACTICE.

Evidence.—Prove (1) that the accused appeared in some public place, or some place which it was a trespass in him to enter.

[1] Act V of 1861, s. 34 (6).

(2) That he was then in a state of intoxication.

(3) That he conducted himself in such a manner as to cause annoyance to some person.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by any Magistrate—Triable summarily.

The accused was convicted under s. 341 for wrongful restraint. It was held, quashing the conviction, that there was ample justification for the accused, not as a Village Magistrate but as a private citizen, to put a restraint upon the drunken and disorderly person who was not only threatening to commit a breach of the peace but was a danger to the other villagers[1]

[1] *Ramaswami Ayyar*, (1921) 44 Mad 913.

CHAPTER XXIII.

Of Attempts to Commit Offences.

Punishment for attempting to commit offences punishable with transportation or imprisonment.

511. Whoever attempts to commit an offence punishable by this Code[1] with transportation or imprisonment, or to cause such an offence to be committed[2], and in such attempt does any act towards the commission of the offence[3], shall, where no express provision is made[4] by this Code for the punishment of such attempt, be punished with transportation or imprisonment of any description provided for the offence, for a term of transportation or imprisonment which may extend to one-half of the longest term[5] provided for that offence, or with such fine as is provided for the offence, or with both.

ILLUSTRATIONS.

(*a*) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.

(*b*) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section.

COMMENT.

This is a general provision dealing with attempts to commit offences not made punishable by other specific sections.

By s. 10 of the Indian Army (Amendment) Act (XI of 1918) a similar provision is inserted in the Indian Army Act (VIII of 1911) as s. 39A.

Scope.—According to the Allahabad High Court this section does not apply to attempts to commit murder which are fully and exclusively provided for by s. 307[1]. The Bombay High Court has, however, held otherwise[2]. The former Chief Court of the Punjab laid down that this section was "in terms much wider than s. 307. Under the last-mentioned section (s. 307) the act done must...be capable of causing death, and it must also be the last proximate act necessary to constitute the completed offence; under s. 511 the act may be *any* act in the course of the attempt towards commission of the offence"[3].

This section does not apply to cases of dacoity[4].

Stages of a crime.—In every crime, there is, first, intention to commit it; secondly, preparation to commit it; thirdly, attempt to commit it. If the third stage, that is attempt, is successful, then the crime is complete. If the attempt fails the crime is not complete but the law punishes the person attempting the act. An 'attempt' is made punishable, because every 'attempt', although it fails of success, must create alarm, which of itself is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment; but as the injury is not as great as if the act had been committed, only half the punishment is awarded[5].

1 *Niddha*, (1891) 14 All. 38; *Tulsha*, (1897) 20 All. 143.
2 *Cassidy*, (1867) 4 B. H. C. (Cr. C.) 17.
3 Per Rattigan, J., in *Jiwan Das*, (1904) P. R. No. 30 of 1904, p. 86.
4 *Koonee*, (1867) 7 W. R. (Cr.) 48.
5 Livingstone.

Every attempt to commit a felony or misdemeanour is under common law a misdemeanour.

And attempt to commit a crime is to be distinguished from an intention to commit it; and from preparation made for its commission[1].

1. **Intention.**—Intention is the direction of conduct towards the object

taken for the deed" unless there be some external act which shows that progress

...ntion

... bare

done,

the law judges, not only of the act done, but of the intent with which it is done, and if it is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes cr... (that is, a... onsequence m... ; from the doing the act[6].

Although there is no presumption that a person intends what is merely a possible result of his action or a result which, though reasonably certain, is not known to him to be so, still it must be presumed that when a man voluntarily does an act knowing at the time that in the natural course of events a certain result will follow he intends to bring about that result[7].

2. **Preparation.**—Preparation consists in devising or arranging the means or measures necessary for the commission of the offence It differs widely from attempt which is the direct movement towards the commission after preparations are made[8]. Where a man, having a wife living, caused the banns of marriage between himself and a woman to be published, it was held that he could not be punished for an attempt to commit bigamy, because the act of causing the publi-

marrying her[9]. The provisions of the section do not extend to make punishable as attempts acts done in the mere stage of preparation[10].

Preparation to commit an offence is punishable only when the preparation is to commit offences under s 122 (waging war against the King-Emperor) and

mmit an

[12].

The question whether a certain act is merely one of preparation or one committed in the course of an attempt is a question of fact[13].

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5 *Scofield* (1874) Cald 297, 403.

6 Per Ellenborough, C J, in *Dixon*, (1811)

4 Bom L R. 280.

8 *Lakshumi Prasad*, (1922) 23 Cr. L. J. 108.

9 *Peterson*, (1876) 1 All. 316; *Padala Venkatasami*, (1881) 3 Mad. 4, 5. See *Srinivasan*, (1902) 25 Mad 726

10 *Ramsarun Choubey*, (1872) 4 N W. P. 46, 48.

11 See *Padala Venkatasami*, (1881) 3 Mad. 4.

12 *Surat Bahadur*, (1924) 1 O W N 362.

13 *MacCrea*, (1893) 15 All 173.

Purchasing of stamp paper.—Mere purchasing of a stamp paper in the name of the person whose name it was intended to forge, was held not to constitute an attempt[1]. But in a subsequent case, on similar facts, the same High Court has held otherwise. M instigated Z to personate C and to purchase in C's name certain stamped paper, in consequence of which the vendor of the stamped paper endorsed C's name on such paper as the purchaser of it. M acted with the intention that such endorsement might be used against C in a judicial proceeding. It was held that the offence of fabricating false evidence had been actually committed, and that M was properly convicted of abetting the commission of such offence[2]. The former case was distinguished on the following grounds: "The endorsement of the stamp-vendor forms no part of the document which it may be assumed it was the intention of the person who procured the endorsement to make on the face of the stamp-paper. The offence of forgery had therefore not proceeded beyond the stage of preparation, but in the case now before the Court there had been an actual fabrication: something had been done. It is true that no judicial proceeding had been instituted, but the petitioner's pleader is unable to suggest any other object for which the false endorsement should have been procured. The petitioner had undoubtedly threatened Chatter Singh that he would make him pay Rs. 50. He could not have carried out his threat without the intervention of the Court. The object of the endorsement made by the vendor of a stamp is to afford proof of the person to whom it is sold, and in suits brought on documents written on stamp-paper it is the usual course, when the execution of the document is denied, to advert to the endorsement and to the stamp-vendor's memory assisted by the endorsement as evidence of the person to whom the stamp was sold, and therefore as evidence of the probability that the document was made by the person by whom the paper was procured. I do not say that in the case cited the accused should have been discharged. Had the point been taken the Court might have held the accused guilty of the offence of which the petitioner has been convicted, but I am of opinion that in the case before the Court the evidence for the prosecution warranted the inference that the petitioner procured the false endorsement for the purpose of thereafter using it in a judicial proceeding, and consequently that the conviction is not open to the objection taken to it"[3].

In another case, C, calling himself K, went to a stamp-vendor, accompanied by a man named Kalyan, and purchased from him in the name of K a stamp paper. The two men then went to a petition-writer, and C again giving his name as K, they asked the petition-writer to write for them a bond for Rs. 50 payable by K to Kalyan. The petition-writer commenced to write the bond, but, his suspicions having being aroused, did not finish it, but took C and Kalyan to the nearest police-station. It was held that Kalyan was guilty of an attempt to commit the offence under s. 467, and C of abetment of the said attempt[4]. *Ramsarun's* case was distinguished on the ground that nothing was written on the stamp-paper in that case.

False document.—In a case the Madras High Court arrived at the same conclusion as that in *Ramsarun's* case. The accused had conspired with other persons to prepare a document purporting to be a valuable security which he knew would be a false document, and be used for the purposes of fraud. He for that end prepared a draft which he was about to copy on an old stamp paper produced for the purpose, and applied to a witness to supply the Telugu date corresponding to the English date which the document was to contain. It was held that the accused had not passed beyond the stage of preparation, and was not guilty of an attempt to forge[5]. The Court, however, convicted him of abetment.

1 *Ramsarun Chowbey,* (1872) 4 N. W. P. 46. See *Gulab Singh,* (1916) 14 A. L. J. 688.

2 *Mula,* (1879) 2 All. 105.

3 Per Turner, J., in *Mula, ibid,* p. 106.

4 *Kalyan Singh,* (1894) 16 All. 409.

5 *Padala Venkatasami,* (1881) 3 Mad. 4.

In a Calcutta case, a person gave orders for the printing of certain receipt forms similar to those used by the Bengal Coal Company, and corrected the proofs of the same, *it being his intention to use the receipt forms in order to commit a* fraud. It was held that he could not be convicted of an attempt to commit forgery until he had done some act towards making one of the forms a false document, that until a form had been converted into a document, all that was done consisted in mere preparation for the commission of an offence. Garth, C J., said: "In my opinion, the printed form was not in itself a false document, and that it would not have become a false document, or part of a document (according to the definition in s 464,) until the seal or signature of the Bengal Coal Company had been forged upon it, so as to make it appear that such seal or signature was that of the Bengal Coal Company The prisoner, therefore, would not be guilty of the offence of forgery until the printed form had thus been converted into a false document; and for the same reason, I think that he would not be guilty of an attempt

the crime of forgery, if not interrupted"'[1] But as it was, all that he did consisted in mere preparation for the commission of the crime He was no more guilty of an attempt to commit forgery in having the forms printed, than he would have been of an attempt to commit burglary by having a false key made of the house where he intended to commit the offence". Prinsep, J., said: "The acts, committed do not amount to an attempt, but at most only [illegible] which might have proceeded no further. The [illegible] which would have ended in the crime if not [illegible] 'attempt' as given in the judgment in this case may be regarded as overruled in view of later English decisions on the point[2].

Personation.—Where the accused was found carrying a police jacket under his arm with intent that it should be believed that he was a police constable, it was held that he was not guilty under s 171 as his act amounted merely to preparation to commit the offence punishable under that section[3]

[illegible] —Where the accused by fals[illegible]

possession going in the direction of the place where the cows were about to be milked, this milk being in a can similar to those in which the cows were milked. It was held that his act did not amount to more than preparation[5].

Procuring poisonous drug to kill a person.—The accused asked a native doctor to supply her with medicine for the purpose of poisoning her son-in-law. It was held that the offence committed was not an attempt to murder, as it was a mere act by way of preparation to commit an offence and was not a transaction which would have necessarily ended in murder if not interrupted, but that such act might be held to be an instigation by the native doctor to abet the accused in the commission of murder, and with reference to s 108, expln 4, might have been punished under ss 116 and 302[6].

1 *Riasat Ali*, (1881) 7 Cal. 352, 356, 357
2 *Brown*, (1889) 24 Q B. D 357; *Ring*, (1892) 17 Cox 491
3 *Nga Po Kyaw*, (1904) 1 U. B R. (P. C) 3
4 *Dhundi*, (1886) 8 All 304
5 *Sukha*, (1885) P R. No. 40 of 1885.
6 *Musst Bakhtawar*, [illegible] No. 24 of 1882.

Administering poison.—Where a woman with a view to poison her husband administered to him a substance which was harmless and which could not in any circumstances bring about his death, but which she believed to be poison, it was held that she could not be convicted under this section read with s. 328, as the administration of the harmless substance was not an act towards the administration of the poisonous substance. Her act which was complete in itself and not constituting an offence could not constitute an attempt to commit an offence[1].

Arming oneself with a weapon to kill another.—The accused, on quarrelling with the complainant, fetched a sword, but was seized and disarmed by others before he could use it. He, however, asserted, while under restraint, his intention of killing the complainant if he were let go. It was held that fetching a sword was not an attempt under this section, since it was not "an act of such an approximate nature as would amount to an attempt to commit murder or grievous hurt; there was, it may be conceded, a preparation towards the commission of some such offence, but mere preparation is not sufficient to complete the offence of attempt under s. 511...It is quite possible that although the prisoner fetched the sword he might not after all have actually used it against the complainant, who was his own brother"[2]. Similarly, where the accused raised his knife in a threatening manner manifesting an intention to stab, but did not actually try to stab the complainant, it was held that the act fell short of an attempt to stab[3].

Suicide.—A woman ran to a well, stating that she would jump into it, and she was caught before she could reach it. The High Court in holding that she could not be convicted of an attempt to commit suicide remarked: "There is no doubt that the accused intended to commit suicide, and that she prepared to carry out that intention and proceeded to the well. She might have, however, still changed her mind, and she was caught before she did anything which might be regarded as the commencement of the offence"[4].

Murder.—A young Brahmin widow was confined of a child. The Chief Constable of Police, acting on information that the accused was about to kill the baby, went to search her house with a number of men, and found her lying on the first floor, and discovered on the second floor a living new-born child wrapped up in a cloth with a cooking pot turned over it. The Sessions Judge convicted the accused of attempt to murder. The High Court, on appeal, reversed the conviction, on the ground that the evidence was insufficient to support it[5].

Theft.—The accused, with another boy, was seen by a policeman to sit together on some doorsteps near a crowd, and when a well-dressed person came up to see what was going on, one of the accused made a sign to others, and two of them got up and followed the person into the crowd. One of them was seen to lift the tail of the coat of that man, as if to ascertain if there was anything in the pocket, but making no visible attempt to pick the pocket, and to place a hand against the dress of a woman but no actual attempt to insert that hand into the pocket was observed. They then returned to the door step and resumed their seats. They repeated this two or three times. It was held that this was not sufficient evidence of an attempt to steal[6].

House-trespass.—A person, who went at night on the roof of the house of another person with a stick and an instrument used for house-breaking, was held to have committed house-trespass under s. 447, and not attempt to commit.

1 *Mt. Rupsir Panku*, (1895) 9 C. P. L. R. (Cr.) 14.

2 *Data Ram*, (1882) P. R. No. 45 of 1882. See also *Shera*, (1868) P. R. No. 18 of 1868.

3 *Tha Do Hla*, (1902) 1 L. B. R. 264.

4 Per Muttusami Ayyar, J., in *Ramakka*, (1884) 8 Mad. 5, 6.

5 *China*, (1871) 8 B. H. C. (Cr. C.) 164.

6 *Taylor*, (1871) 25 L. T. 75.

house-breaking by night[1]. The Court observed: "Mere presence on the roof of the house cannot be construed into an attempt to commit an offence under s 511... In order to apply s. 511...it is necessary not merely that there should be an attempt to commit an offence, but likewise that an act was done as such attempt towards the commission of the offence. Mere passing on the roof of the house cannot in any sense be termed an act towards the commission of the burglary. It is an act of approach towards the house for the purpose of stealthily effecting an entrance into the premises, but can hardly be said to exceed the limits of mere preparation. While on the roof the accused had yet time to make up his mind to recede or attempt an entrance according as he found his opportunity or the state of vigilance inside the premises It cannot be said that by his presence on the roof of the house he had finally committed himself to committing the offence of house-breaking".

Cheating.—The mere taking of thumb impressions on a blank piece of paper may be a preparation to cheat but unless something is written on it, it cannot amount to cheating or attempt to cheat The Court said "It is not enough to assume that probably the intention of the petitioners was to convert the blank paper into a written document Were we to find that the mere presence on the paper of thumb impressions was sufficient to show an intention to use that paper dishonestly, then the hobby of autograph collecting would be a dangerous one"[2]. The mere writing out of bogus telegrams with a view to despatch them for the purpose of cheating amounts only to preparation[3]. The forwarding of fictitious consignment notes by a Station Master was held merely to be a preparation to commit the offence of cheating, as it was not done in the attempt to cheat[4]. This view is not sound, though the decision is right as the accused was convicted of abetment. With the object of obtaining money under an insurance policy the accused had recourse to a fraudulent device in order to attract the attention of passers-by and induce them to believe that he had been assaulted, bound, and robbed by burglars Owing to the intervention of the police, who discovered the fraud, no communication was made to the underwriters, nor was any claim made under the policy. It was held that the accused could not be convicted of an attempt to obtain money by false pretences[5] A debtor sent a parcel containing waste paper by insured post, to his creditor, as if the parcel contained currency notes and thus [illegible] It was held that the debtor [illegible] arming himself with the post [illegible] cheat or attempt to cheat[6]. A clerk employed to weigh carts of sugar-canes upon a machine and enter the gross, tare and net weights in a register, weighed a cart of sugar-cane and entered its gross weight as 16 maunds, 30 seers, but soon after the cart was re-weighed by a superior officer and found to be only 14 maunds, 20 seers. The clerk had not filled up the other columns fixing the liability absolutely upon the company when he was intercepted and charged for cheating It was held that the writing of the false figure in the register had not passed from the stage of preparation into that of an attempt to commit the offence of cheating[7].

Adultery.—Preparation or providing an opportunity is a stage of the proceeding short of attempt and is not punishable by law[8]. An opportunity was made for sexual intercourse by a married woman's going to the accused's shop. She was at once followed, and the shop, as it were, besieged. It was held that the acts done amounted only to preparation and were not punishable as an attempt

[1] *Waldad*, (1907) P. R. No. 15 of 1907, followed in *Batwa Khan*, (1919) 10 L. B. R. 51.

[2] *Sheo Prasad*, (1926) 7 P. L. T. 772, 27 Cr L. J. 609, 610

[3] *Raman Chettiar*, (1926) 28 Cr. L. J. 95

[4] *Raghunath*, (1889) Unrep Cr C. 470.

[5] *Robinson*, [1915] 2 K. B 342.

[6] *Kunju*, (1926) 24 L W. 725.

[7] *Lakshumi Prasad*, ([illegible] Cr L [illegible]

[8] *Paira Ram*, (19[illegible] [illegible]25.

to commit adultery[1]. The presence of a woman in the same room with the accused was held insufficient to prove any attempt to commit adultery[2].

Kidnapping.—The law allows *locus pœnitentiæ*, and will not hold that a person has attempted a crime until he has passed beyond the stage of preparation[3]. An indirect preparation which does not amount to an act which can be held to be a commencement of the offence does not constitute either a principal offence or an attempt or abetment of the same. A minor girl under the age of sixteen years was taken by accused No. 1, under the direction of accused No. 2, from Sholapur to Tuljapur (in the Nizam's territory) and there dedicated to goddess Amba, with intent or knowing it to be likely that the minor would be used for the purpose of prostitution. It was held that the intention of either of the accused while they were staying at Sholapur did not constitute any offence, and their removal with the girl to Tuljapur did not by itself constitute an abetment. Ranade, J., said:"In the present case, beyond the mere intention and indirect preparation, there was no distinct offence by way of instigating the act committed out of British India. Mere intention not followed by any act cannot constitute an offence, and an indirect preparation, which does not amount to an act which amounts to a commencement of the offence, does not constitute either a principal offence, or an attempt or abetment of the same"[4].

Rape.—Facts amounting to preparation only so far as a particular offence is concerned may independently amount to another offence under certain circumstances. In a case the accused was convicted by the Sessions Judge of an attempt to rape. On appeal, it was contended that the evidence could not be relied on as establishing more than an indecent assault. Melvill, J., said: "The only point on which we entertain any doubt in this case is whether the prisoner's conduct amounted to an attempt to commit rape. In *Reg.* v. *Lloyd*[5], Patterson, J., in summing up, said:—'In order to find the prisoner guilty of an assault with intent to commit a rape, you must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part'. We believe that in this country indecent assaults are often magnified into attempts at rape, and even more often into rape itself; and we think that a conviction of an attempt at rape ought not to be arrived at, unless the Court be satisfied that the conduct of the accused indicated a determination to gratify his passions at all events, and in spite of all resistance. In the present case, having regard to the medical evidence, and to the varying statements made at different times by the complainant, we find it impossible to place entire reliance upon her statement; and, as to the extent of the violence to which she was subjected, there is no evidence except her own statement. The Sessions Court has not believed her allegation that penetration took place, and has consequently refused to convict the prisoner of rape. We feel a similar hesitation in coming to the conclusion, on the complainant's unsupported statement, that the prisoner's conduct amounted to an attempt to commit rape. He seems to have desisted before he was interrupted; and no evidence has been given to show that the complainant's person showed marks of violence (while the Civil Surgeon's evidence is to the contrary effect), nor that the clothes, either of the complainant or the prisoner showed any stains, which would indicate to what point the prisoner's criminality had proceeded"[6]. The conviction was made under s. 354.

1 *Paira Ram*, (1902) P. R. No. 25 of 1902.
2 *Ghulam Mahomed*, (1879) P. R. No. 13 of 1879.
3 *Padala Venkatasami*, (1881) 3 Mad. 4.
4 *Baku*, (1899) 24 Bom. 287, 291, 1 Bom. L. R. 678, 681.
5 (1836) 7 C. & P. 318, 319.
6 *Shankar*, (1881) 5 Bom. 403, 404.

3. Attempt.—'Attempt' is the direct movement towards the commission after the preparations have been made[1]. An attempt to commit a crime must be something more than mere preparation[2]. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are[3]. The difference between mere preparation and actual attempt to commit an offence consists chiefly in the greater degree of determination in 'attempt' as compared with 'preparation'[4], and such greater degree of determination may be estimated in various ways. Where one step of the accused is decidedly illegal *per se*, that is a great proof of fixed determination. Where such acts are open and not hidden, that is a further proof of determination.

"Attempt is an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime, in other words, an attempt consists in the intent to commit a crime, combined with the doing of some act adapted to, but falling short of, its actual commission; it may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted"[5]

The Calcutta High Court in *Riasat Ali's* case[6], laid down that a person [illegible] this section unless [illegible] succeeded. It [illegible] v. *M'Pherson*[7] (viz., "The word 'attempt' clearly conveys with it the idea, that if the attempt had succeeded, the offence charged would have been committed"), and of Blackburn, J., in *R.* v. *Cheeseman*[8] (viz., "If the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime"). In *M'Pherson's* case the accused was indicted for breaking and entering a dwelling house and stealing therein certain goods All those goods had been stolen by other persons before the accused entered the house, but there were other goods of the complainant which the accused might have stolen if he had not been interrupted. The jury acquitted the accused of the felony charged, but found him guilty of breaking and entering the dwelling-house of the complainant and attempting to steal his goods therein It was held that the conviction was wrong In *Cheeseman's* case the accused was entrusted by his master with some meat which was to be weighed out and delivered to a customer By means of a false weight he kept back a part of the meat with intent to steal it, but the fraud was discovered before he had actually moved away with it It was held that he had committed an attempt to steal the meat *M'Pherson's* case was followed in *R.* v. *Collins*[9] wherein Cockburn, C. J., again said: "An attempt to commit felony can only in point of law be made out where, if no interruption had taken place, the attempt could have been carried out successfully, so as to constitute the offence which the accused is charged with attempting to commit". In this case the accused put his hand into the gown pocket of a lady with intent to steal what he could find there; but the pocket was empty and he could not steal anything. It was held that he could not be convicted of an attempt to steal But *Collins'* case has been expressly overruled in *R.* v. *Brown*[10] and *R* v. *Ring*[11], which lay down that in order to prove that an attempt to commit a felony has been committed, it is not necessary to prove that, had the attempt not been frustrated, the felony

[1] Quoted with approval from Mayne's Criminal Law in *Petersons'* case, (1876) 1 All. 316, 317; and *Padala Venkatasami*, (1881) 3 Mad. 4

[2] *Robinson*, [1915] 2 K. B. 342.

[3] *Eagleton*, (1855) 6 Cox 559.

[4] *Mangal*, (1884) 1 O. D 129.

[5] Per Mookerjee, J, in *Amrita Bazar Patrika Press Ltd*, (1919) 47 Cal 190, 234, *Kishen Singh*, (1927) 28 Cr. L J. 663; 28 P. L. R. 575

[6] (1881) 7 Cal 352.

[7] (1857) Dears & B 197, 202, 7 Cox 281.

[8] (1862) L & C. 140, 145

[9] (1864) 33 L J (M C) 177, 178.

[10] (1889) 25 Q B. D. 357.

[11] (1892) 17 Cox 491.

would have been committed. In *Brown's* case the accused had pleaded guilty to an indictment charging him with having attempted to commit unnatural offences with domestic fowls. In *Ring's* case the accused were seen to hurry on to the platform of a station just as a train was about to start; they did not go by that train, and separated on reaching the platform. On the arrival of the succeeding train, they crowded round and hustled a woman who was entering a compartment, and one of them was seen endeavouring to find the pocket of her dress. It was held that they were guilty of an attempt to steal. In *Q.* v. *Williams*[1], two Judges expressly say that they do not assent to the notion that a person cannot be convicted of an attempt to do that which the law says he cannot do. However, in a case[2], decided two years after *Brown's* case, we find the Calcutta High Court re-affirming its decision in *Riasat Ali's* case. The view of the Calcutta High Court is, therefore, not in accordance with the present view of the English law, and, as it is based on the authorities which are expressly overruled, it is no longer good law.

The Allahabad High Court has not followed *Riasat Ali's* case. It has remarked in *Ramsarun's* case[3] and in *MacCrea's* case[4] that the rulings of English Judges on the criminal law of England are inapplicable to the interpretation of the Indian Penal Code, which the Courts in India must interpret on the same principles of interpretation as they would employ in the interpretation of any other Act of the legislature. In the latter case A had obtained administration to the estate of his brother H, and had caused a Government promissory note, No. 9764, which belonged to M, to be entered in the letters of administration as part of the estate of the deceased. The note was in the possession of the Controller-General and the accused MacCrea joined A, in an attempt to induce that officer to deliver it to him, or to A. Letters were written by the accused to that officer but they were not relied on; and the Judge directed the attention of the jury to the acts committed by the accused in making use of the letters of administration granted to A, and in the preparation of a so-called copy of the lost note, and its production before the City Magistrate. The scheme failed, and the accused was convicted of an attempt to cheat[5].

In *Ramsarun's* case[6], Turner, J., said: "To constitute then the offence of attempt under this section, there must be an act done with the intention of committing an offence, and for the purpose of committing that offence, and it must be done in *attempting* the commission of the offence.

"Two illustrations of the offence of attempt as defined in this section are given in the Code; both are illustrations of cases in which the offence has been committed. In each we find an act done with the intent of committing an offence, and immediately enabling the commission of the offence, although it was not an act which constituted a part of the offence; and in each we find the intention of the person making the attempt was frustrated by circumstances independent of his own volition.

"From the illustrations it may be inferred that the Legislature did not mean that the act done must be itself an ingredient (so to say) of the offence attempted, and in this respect there appears to me there is a noticeable difference between the definition given in the section under consideration and that given in section 307. To convict a person of an attempt to murder under section 307 it must be shown that he has done some act with such intention that, if *by that act* he caused death he would be guilty of murder under section 307, then the act necessary to constitute the attempt is an act which, if it had not fallen short of its object, would have constituted the offence attempted. Similarly, to constitute an attempt under section 308, the act proved must be an act which, had the results contemplated by

[1] [1893] 1 Q. B. 320.

[2] *Chandi Pershad* v. *Abdur Rahman*, (1894) 22 Cal. 131, 138.

[3] (1872) 4 N. W. P. 46.

[4] (1893) 15 All. 173, 178.

[5] *MacCrea*, (1893) 15 All. 173, 176.

[6] (1872) 4 N. W. P. 46, 47, 48.

the doer followed, would have completed the offence attempted, whereas, under the terms of section 511, it is only necessary to prove an act done in the attempt *towards* the commission of the offence, and, as the illustrations show, an act in itself complete, and not falling short of its object, or failing to bring about the result anticipated by the doer.

"The circumstances stated in the illustrations to section 511, . would not *have constituted attempts under the English law, and I cannot but think that* they were introduced in order to show that the provisions of section 511,... were designed to extend to a much wider range of cases than would be deemed punishable as offences under the English law."

In *MacCrea's* case[1], Knox, J., observed: "In that case (*Q E v. Riasat Ali*), *the learned Chief Justice appears to have acted upon English precedents, and those* percedents, precedents of no modern date So far as I am concerned, I feel myself unable to follow the English law, because there appears to me a wide difference between the meaning of the word 'attempt' as understood by English lawyers in the phrase 'attempt to commit a felony', and the word 'attempt' as actually defined in the Indian Penal Code . With all respect therefore to the learned Judges who decided the case of *The Queen-Empress* v *Riasat Ali*, I have no doubt myself that the interpretation laid down by them is not a sound and exhaustive interpretation of the word 'attempt' as used in s 511" In this case no reference *is made to Peterson's case*[2], *in which Pearson, J, followed the American rule that* "an attempt can only be manifested by acts which would end in the consummation of the offence, but for the intervention of circumstances independent of the will of the party".

Following the above observations, the Madras High Court held that "in the *offence of cheating the actual transaction must have begun and an act to bear* upon the mind of the victim must have been done before a preparation can be said to be an attempt"[3].

In a Bombay case 'attempt' has been defined as 'an intentional preparatory action which fails in object—which so fails through circumstances independent *of the person who seeks its accomplishment*"[4] "Where *a man does* an intentional act with a view to attain a certain end and fails of his object through some circumstances independent of his own will, then that man has attempted to effect the object at which he aimed"[5]. All that is necessary to constitute an attempt is [illegible] ostensible of which the law can take [illegible] *ission of the offence* It

[illegible] an act done with intent [illegible]

particular case". Attempt is also [illegible] criminal design, amounting to more than mere preparation, but falling short of actual consummation and possessing, except for failure to consummate, all the elements of the substantive crime"[3].

r. 'Offence punishable by this Code'.—This leaves untouched attempts to commit, or to cause to be committed, offences under special or local laws which

[1] (1893) 15 All 173, 177, 178.

[2] (1876) 1 All 316, 317.

[3] Per Jackson, J., in *Raman Chettiar*, (1926) 28 Cr. L. J. 96, 97.

[4] Per Jenkins, C. J., in *Luxman Narayan Joshi*, (1899) 2 Bom. L R 286, 296

[5] Per Jenkins, C J., in *Vinayak Narayen Bhatye*, (1899) 2 Bom L R. 304, 307, 308, *Jaimal*, (1924) 1 Lah C. 331.

[6] *Ganesh Balvant Modak*, (1909) 34 Bom. 378, 12 Bom. L R 21; *Rahamat Ali*, (1927) 28 Cr L J 680, 681.

[7] [illegible]

[8] [illegible] paed [illegible] where [illegible] given.

are not also offences under the Code. No criminal liability can be incurred under the Code by an attempt to do an act which, if done, will not be an offence against the Code[1].

Impossible offence.—"An attempt...is possible, even when the offence attempted cannot be committed; as when a person, intending to pick another person's pocket, thrusts his hand into the pocket, but finds it empty. That such an act would amount to a criminal attempt, appears from the illustrations to section 511. But in doing such an act, the offender's intention is to commit a complete offence, and his act only falls short of the offence by reason of an accidental circumstance which has prevented the completion of the offence...It is possible to attempt to commit an impossible theft and so offend against the Code, because theft is itself an offence against the Code, and may, therefore, be attempted within the meaning of the Code"[2].

The trend of recent English decisions, as already observed, is that it is not necessary that it should have been legally or physically possible for the offender to commit the full offence[3].

2. 'With transportation or imprisonment'.—Offences punishable with death only, or fine only, are not contemplated by this section.

3. 'To cause such an offence to be committed'.—This will include an attempt to abet an offence. So it has been held that it is not legally impossible to attempt the abetment of an offence—the abetment of an offence being itself an offence[4]. A common form of such attempt is the soliciting of another to commit an offence. The act done towards the commission of the offence consists in the solicitation itself. It will not affect the offence though the person solicited declines the persuasion.

4. 'Does any act towards the commission of the offence'.—In each of the two illustrations given under this section there is not merely an act done with the intention to commit an offence, which act is unsuccessful because it could not possibly result in the completion of the offence, but an act is done 'towards the commission of the offence,' that is to say, the offence remains incomplete only because something yet remains to be done, which the person intending to commit the offence is unable to do by reason of circumstances independent of his own volition. Thus, in ill. (*a*) the act of breaking open the box is done towards the commission of the theft of the jewels. The theft itself, that is the actual removal of the jewels, still remains to be done and it remains undone only because it turns out that there are no jewels to remove. In ill. (*b*) Z fails to comply with the essentials of theft simply because there is nothing in the pocket.

The words 'does any act towards the commission of the offence' must not be construed to include all acts, however remote, which tend towards the commission of the offence. The thing done may be too small or it may proceed too short a way towards the accomplishment of the offence for the law to notice it as an attempt (*vide* ills. to s. 307). "It is difficult, and perhaps impossible, to lay down a clear and definite rule, to define what is, and what is not such an act done, in furtherance of a criminal intent, as will constitute an offence;...

1 *Mangesh Jivaji*, (1887) 11 Bom. 376, 381; *Boston*, (1910) P. R. No. 2 of 1911.

2 Per Birdwood, J., in *Mangesh Jivaji*, *ibid*., pp. 380, 381. *Mt. Rupsir Panku*, (1895) 9 C. P. L. R. (Cr.) 14, does not lay down sound law. In that case a woman with a view to poison her husband administered to him a substance which was harmless and which could not in any circumstances bring about his death, but which she believed to be poison. It was held that she could not be convicted under this section and s. 328 as the administration of the harmless substance was not an act towards the administration of a poisonous substance; and that her act which was complete in itself and not constituting an offence, could not constitute an attempt to commit an offence.

3 *Brown*, (1889) 24 Q. B. D. 357; *Ring*, (1892) 17 Cox 491; *Williams*, [1893] 1 Q. B. 320.

4 *Spier*, (1887) P. R. No. 49 of 1887.

Many acts, coupled with the intent, would not be sufficient. For instance, if a man intends to commit a murder, and is seen to walk towards the place of the contemplated scene, that would not be enough"[1]. It has been laid down that "Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it; but acts immediately connected with it are"[2]. The act must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power [illegible] overt act to render [illegible] stack, if he go to t[illegible] fer match for that purpose, but abandons the attempt because he finds that he is being watched.

In a village, incendiarism had occurred on several occasions produced by a ball of rag with a piece of burning charcoal within it. The accused one evening was discovered to have a ball of that description concealed in his loin cloth which contained burning charcoal. It was held, but not unanimously, that he was guilty of an attempt to commit mischief by fire. Glover, J., said "Had this ball contained a piece of unlighted charcoal only, I should have considered that there had been no sufficient commencement of any act which tended towards the commission of mischief by fire, and that the prisoner would have been in the same position as a person who, intending to murder some other person whether by shooting or poisoning him, buys a gun or poison and keeps the same by him, such acts being ambiguous, and not so immediately connected with the offence as to make the parties punishable under s. 511. But, in this case, the instrument for causing mischief by fire was completely ready and was not used, only because the party carrying it had no opportunity. It must, I think, be assumed, that a person going about at night provided with an apparatus specially fitted for [illegible]

[illegible] with a ball of rag containing a [illegible] with [illegible] to a [illegible] second [illegible] in the absence of such evidence it is impossible to say that he intended to [illegible] a building used as a human dwelling. The mere fact of being in [illegible] of a ball, like the one which was found with the prisoner, is by no means [illegible] to warrant a conviction for attempting to cause mischief by fire. In [illegible] a conviction for attempting to commit an offence of the nature [illegible] s. 51[illegible] it is not only necessary that the prisoner should have done [illegible] towards the commission of the offence', but that the act itself should [illegible] '*the attempt*' to commit it. The Sessions Judge says that [illegible] prisoner went out of his house with the ball which was [illegible] an overt act, 'towards the commission of the offence'. [illegible] any attempt to commit a particular offence, and if [illegible] attempt'? I am of opinion, that both these [illegible]

[illegible]

other cause, can it be said that the man is [illegible] going out of one's house with a loaded [illegible]

[1] Per Jervis, C. J., in *William Eagleton* [illegible] (1855) Dears. 539, 550.
[2] Per Parke, B., in *Eagleton*, (1855 [illegible]

[illegible]

In *Ramsarun's case*[6], Turner, J., said: "I do not hold that the provisions of this section would extend to make punishable as attempts acts done in the mere stage of preparation. Although such acts are doubtless done toward the commission of the offence, they are not done *in the attempt* to commit the offence in the construction which I think should be put on the term 'attempt' as used in this section. I regard that term as here employed as indicating the actual taking of those steps which lead immediately to the commission of the offence, although nothing be done, or omitted, which of itself is a necessary constituent of the offence attempted". But in *MacCrea's case*[7], Knox, J., after remarking that Turner, J., arrived at that conclusion not without some doubt, observes: "I do not hold, and have no hesitation in saying, that s. 511 was never meant to cover only the penultimate act towards completion of an offence and not acts precedent, if those acts are done in the course of the attempt to commit the offence, are done with the intent to commit it and done towards its commission.

1 *Doyal Bawri*, (1869) 3 Beng. L. R. (A. Cr. J.) 55, 56, 57.

2 Bishop's New Criminal Law, Vol. 1, s. 739, (8th Edn.), p. 446.

3 *Duckworth*, (1892) 17 Cox 495.

4 *Jackson*, (1890) 17 Cox 104.

5 *Jiwan Das*, (1904) P. R. No. 30 of 1904.

6 (1872) 4 N. W. P. 46, 48.

7 (1893) 15 All. 173, 179.

"It is no doubt most difficult to frame a satisfactory and exhaustive definition which shall lay down for all cases where preparation to commit an offence ends and where attempt to commit that offence begins. The question is not one of mere proximity in time or place. Many offences can easily be conceived where, with all necessary preparations made, a long interval will still elapse between the hour when the attempt to commit the offence commences and the hour when it is completed. The offence of cheating and inducing delivery is an offence in point. The time that may elapse between the moment when the preparations made for committing the fraud are brought to bear upon the mind of the person to be deceived and the moment when he yields to the deception practised upon him may be a very considerable interval of time There may be the interposition of inquiries and other acts upon his part. The acts whereby those preparations may be brought to bear upon the mind may be several in point of number, and yet the first act after preparation completed will, if criminal in itself, be, beyond all doubt, equally an attempt with the ninety and ninth act in the series

"Again, the attempt once begun and a criminal act done in pursuance of it towards the commission of the act attempted, does not cease to be criminal attempt, in my opinion, because the person committing the offence does or may repent before the attempt is completed The attempt to defraud a widow of valuable security commenced by an act of criminal intimidation committed in such attempt and towards the fraud does not cease to be an attempt because the perpetrator repents and abstains from completing the attempt

"The question whether the act is an act of preparation or an act in the attempt and towards commission is a fact to be determined upon the evidence It is in most cases a question for the jury to distinguish between an act before attempt has begun, an act after attempt begun, and towards commission of the offence attempted, and an act independent of the attempt altogether".

Blair, J, also in the same case[1], remarks "The definition of 'attempt' is conveyed in s 511...It seems to me that that section uses the word 'attempt' in a very large sense; it seems to imply that such an attempt may be made up of a series of acts, and that any one of those acts done towards the commission of the offence, that is, conducive to its commission, is itself punishable, and, though the Act does not use the words, it can mean nothing but punishable as an attempt. It does not say that the last act which would form the final part of an attempt in the larger sense is the only act punishable under the section. It says expressly [illegible]
the rulings in the English cases ..

"The difficulty with s 511 might easily have been removed by saying that where in such an attempt, using the word in the larger sense, any person does any act towards the commission of an offence, he shall be held to have committed an 'attempt' within the meaning of this section. That I take to be the real meaning and drift of the section, differentiating in a marked manner the definition of 'attempt' in the Indian Penal Code and the accepted English doctrine". The Privy Council on leave to appeal in this case observed: "The learned Judge who tried the case laid down in his charge to the jury that in order to convict the prisoner they must be satisfied, not only that he intended to cheat, but that he had done an act towards that cheating, and the learned Judge clearly had in view the distinction between preparation to commit an offence and acts done towards the commission of the offence"[2].

[1] *MacCrea*, (1893) 15 All. 173, 181, 182. (1893) 20 I. A. 90, 94.
[2] Per Lord Herschell, L. C., in *MacCrea*,

The Bombay High Court, agreeing with the opinion of Knox, J., has held that this section does not relate only to the penultimate act, but to all preceding acts if they were done with the intent to commit or facilitate the commission of the act[1].

The Calcutta High Court has, in an early case[2], laid down: "In order to support a conviction for attempting to commit an offence of the nature described in s. 511, it is not only necessary that the prisoner should have done an overt act 'towards the commission of the offence', but that the act itself (that is the overt act) should have been done '*in the attempt*' to commit it (that is, the offence)".

The former Chief Court of the Punjab decided that "from the moment when an intention is formed to commit an offence, every act done which facilitates the commission of the offence and which is done with that object in view, is in one sense, 'an act done towards the commission of the offence', but the doing of every such act does not constitute an attempt to commit the offence. It must in every case be a question depending upon the circumstances, whether a particular act done (with the requisite intention) towards the commission of an offence, is sufficiently proximate to its commission to constitute an attempt, or is so remote as to merely constitute preparation for its commission"[3]. An attempt to commit an offence may be committed even though, in order to the completion of the offence, something more remained to be done by the accused[4]. The view that an attempt to commit an offence is not punishable under this section unless the final act short of actual commission of that offence has been accomplished is an erroneous one[5].

False evidence.—Where the accused dug a hole intending to place salt in it, in order that the discovery of the salt might be used in evidence against the prosecutor in a judicial proceeding, it was held that he was guilty of an attempt to fabricate false evidence, because by digging the pit he did an act towards the commission of the offence[6].

Counterfeiting coin.—The accused with intent to coin counterfeit half dollars of Peru, caused to be made and procured in England dies necessary for the purpose of making such counterfeit coin, but which would not alone produce it, but the accused intended to procure the rest of the necessary apparatus for the purpose and with the intention of using the entire apparatus, when procured, in making the counterfeit coin. It was found that the accused intended to make only a few of the counterfeit coins in England by way of trying whether the apparatus would answer before sending it out to Peru to be there used in making counterfeit coin. It was held that to make a few coins in England with the object stated would be to commit the offence of making counterfeit foreign coin and that the procuring the dies was an act in furtherance of the criminal purpose sufficiently proximate to the offence[7].

Unnatural offence.—The accused sent to H a letter with intent to incite H to commit an unnatural offence. H was a boy at school and he had received two other letters from the accused which he had read, but he had not read the one on which the charge was framed and which he had handed over to the school authorities. It was held that the sending of the letter proved the attempt to incite, although it might be doubtful whether it could be said to amount to inciting or soliciting, inasmuch as H was not aware of its contents[8].

1 *Anant Vinayak Puranik*, (1900) 2 Bom. L. R. 653, 25 Bom. 90.

2 Per Mitter, J., in *Doyal Bawri*, (1869) 3 Beng. L. R. (A. Cr. J.) 55, 57. See *Hurjee Mull v. Imam Ali Sirkar*, (1903) 8 C. W. N. 278.

3 Per Plowdon, J., in *Ghulam Mahamed*, (1879) P. R. No. 13 of 1879, approved of in *Jones*, (1925) 4 B. L. J. 83, 27 Cr. L. J. 916, 918.

4 *Abdulla*, (1914) P. R. No. 14 of 1914.

5 *Shib Charan*, (1928) 10 Lah. 253.

6 *Nundah*, (1872) 4 N. W. P. 133.

7 *William Roberts*, (1855) Dears. 539.

8 *Ransford*, (1874) 13 Cox 9.

Bribery.—Where B, who was employed as a clerk in the Pension Department, in an interview with A, who was an applicant for a pension, after referring to his own influence in that department, and instancing two cases in which, by that influence, increased pensions had been obtained, proceeded to intimate that anything might be effected by payment, and, on the overture being rejected, concluded by declaring that A would rue and repent the rejection of it, it was held that the offence of attempting to obtain a bribe was consummated[1]. A person who offers to pay gratification to a public servant is punishable under ss 116, 161, and 511[2].

Cheating.—M wrote a letter to the Currency Office at Calcutta, enclosing were the t of had been withdrawn from circulation and cancelled, sent M the usual form of claim to be filled up and returned to it. It appeared from the evidence that the Currency Office never contemplated paying M in respect of the notes The form was filled up and signed by M, and returned by him to the Currency Office It was held that, although there was no intention on the part of the Currency Office to pay the amount of the notes, M was guilty of an attempt to cheat[3] The accused who was indebted to the complainant, despatched to the latter an envelope insured for Rs. 530 containing two pieces of waste paper, intending to use the receipt for the same as evidence of payment of Rs. 530 towards the liquidation of his debt to the cotton antity of bad cotton, that is, cotton heavily adulterated with rubbish in such a manner that the fraud would be likely to escape the ordinary inspection The complainant's agent, to whom delivery was offered, suspected the character of the The accused were, on these facts, convicted heat. On appeal they were acquitted by the the acts of the accused did not amount to an attempt to cheat but only to a preparation for cheating It was held, setting aside the order of acquittal, that there was a complete case of an attempt to cheat, and attempt and did not proceed was sought to be cheated was did all they could to perfect n which would have led to the finished offence, but for an interruption arising independently of the will of the accu were of g as also not im to

by the fire It but when the committed him-

[1] *Baldeo Sahai*, (1879) 2 All. 253
[2] *Ahad Shah*, (1917) P. R No 18 of 1918.
[3] *Umesh Chunder Mitter*, (1888) 16 Cal. 310; *Shib Charan*, (1928) 10 Lah 253
[4] *Arura*, (1912) P. L. R. No. 299 of 1913.
[5] *Mansing Daji Patil*, (1913) 15 Bom. L. R. 563, 2 Bom. Cr C. 80
[6] *Abdullah*, (1914) P. R. No. 14 of 1914.

The Bombay High Court, agreeing with the opinion of Knox, J., has held that this section does not relate only to the penultimate act, but to all preceding acts if they were done with the intent to commit or facilitate the commission of the act[1].

The Calcutta High Court has, in an early case[2], laid down: "In order to support a conviction for attempting to commit an offence of the nature described in s. 511, it is not only necessary that the prisoner should have done an overt act 'towards the commission of the offence', but that the act itself (that is the overt act) should have been done '*in the attempt*' to commit it (that is, the offence)".

The former Chief Court of the Punjab decided that "from the moment when an intention is formed to commit an offence, every act done which facilitates the commission of the offence and which is done with that object in view, is in one sense, 'an act done towards the commission of the offence', but the doing of every such act does not constitute an attempt to commit the offence. It must in every case be a question depending upon the circumstances, whether a particular act done (with the requisite intention) towards the commission of an offence, is sufficiently proximate to its commission to constitute an attempt, or is so remote as to merely constitute preparation for its commission"[3]. An attempt to commit an offence may be committed even though, in order to the completion of the offence, something more remained to be done by the accused[4]. The view that an attempt to commit an offence is not punishable under this section unless the final act short of actual commission of that offence has been accomplished is an erroneous one[5].

False evidence.—Where the accused dug a hole intending to place salt in it, in order that the discovery of the salt might be used in evidence against the prosecutor in a judicial proceeding, it was held that he was guilty of an attempt to fabricate false evidence, because by digging the pit he did an act towards the commission of the offence[6].

Counterfeiting coin.—The accused with intent to coin counterfeit half dollars of Peru, caused to be made and procured in England dies necessary for the purpose of making such counterfeit coin, but which would not alone produce it, but the accused intended to procure the rest of the necessary apparatus for the purpose and with the intention of using the entire apparatus, when procured, in making the counterfeit coin. It was found that the accused intended to make only a few of the counterfeit coins in England by way of trying whether the apparatus would answer before sending it out to Peru to be there used in making counterfeit coin. It was held that to make a few coins in England with the object stated would be to commit the offence of making counterfeit foreign coin and that the procuring the dies was an act in furtherance of the criminal purpose sufficiently proximate to the offence[7].

Unnatural offence.—The accused sent to H a letter with intent to incite H to commit an unnatural offence. H was a boy at school and he had received two other letters from the accused which he had read, but he had not read the one on which the charge was framed and which he had handed over to the school authorities. It was held that the sending of the letter proved the attempt to incite, although it might be doubtful whether it could be said to amount to inciting or soliciting, inasmuch as H was not aware of its contents[8].

1 *Anant Vinayak Puranik*, (1900) 2 Bom. L. R. 653, 25 Bom. 90.

2 Per Mitter, J., in *Doyal Bawri*, (1869) 3 Beng. L. R. (A. Cr. J.) 55, 57. See *Hurjee Mull v. Imam Ali Sirkar*, (1903) 8 C. W. N. 278.

3 Per Plowden, J., in *Ghulām Mahamed*, (1879) P. R. No. 13 of 1879, approved of in *Jones*, (1925) 4 B. L. J. 83, 27 Cr. L. J. 916, 918.

4 *Abdulla*, (1914) P. R. No. 14 of 1914.

5 *Shib Charan*, (1928) 10 Lah. 253.

6 *Nundah*, (1872) 4 N. W. P. 133.

7 *William Roberts*, (1855) Dears. 539.

8 *Ransford*, (1874) 13 Cox 9.

Bribery.—Where B, who was employed as a clerk in the Pension Department, in an interview with A, who was an applicant for a pension, after referring to his own influence in that department, and instancing two cases in which, by that influence, increased pensions had been obtained, proceeded to intimate that anything might be effected by payment, and, on the overture being rejected, concluded by declaring that A would rue and repent the rejection of it, it was held that the offence of attempting to obtain a bribe was consummated[1]. A person who offers to pay gratification to a public servant is punishable under ss. 116, 161, and 511[2].

Cheating.—M wrote a letter to the Currency Office at Calcutta, enclosing the halves of two Government currency notes, stating that the other halves were lost, and enquiring what steps should be taken for the recovery of the value of the notes. The Currency Office having, upon inquiry, discovered that the amount of the notes had been paid to the holder of the other halves, and that the notes had been withdrawn from circulation and cancelled, sent M the usual form of claim to be filled up and returned to it. It appeared from the evidence that the Currency Office never contemplated paying M in respect of the notes. The form was filled up and signed by M, and returned by him to the Currency Office. It was held that, although there was no intention on the part of the Currency Office to pay the amount of the notes, M was guilty of an attempt to cheat[3]. The accused who was indebted to the complainant, despatched to the latter an envelope insured for Rs. 530 containing two pieces of waste paper, intending to use the receipt for the same as evidence of payment of Rs. 530 towards the liquidation of his debt to the complainant. It was held that the accused was guilty of an attempt to cheat[4].

The accused, having contracted to deliver a certain quantity of good cotton to the complainant, delivered instead for acceptance by the complainant a quantity of bad cotton, that is, cotton heavily adulterated with rubbish in such a manner that the fraud would be likely to escape the ordinary inspection. The complainant's agent, to whom delivery was offered, suspected the character of the goods and declined to accept them. The accused were, on these facts, convicted of the offence of attempting to cheat. On appeal they were acquitted by the Sessions Judge on the ground that the acts of the accused did not amount to an attempt to cheat but only to a preparation for cheating. It was held, setting aside the order of acquittal, that there was a complete case of an attempt to cheat, and [illegible] attempt and did not proceed [illegible] was sought to be cheated was [illegible] did all they could to perfect their [illegible] finish[illegible] accus[illegible] of g[illegible] not t[illegible] buy. N did not buy, but A was arrested. It was argued that no attempt to cheat [illegible]

with three Fire Insurance Companies, and, on the godowns being burnt down, he first sent to the Insurance Companies notices informing them of the fire and subsequently presented his claims in which he deliberately made false statements as to the quantity of paddy stored in the godowns and destroyed by the fire. It was held that the sending of the notices was an act of preparation but when the accused followed up these notices with the actual claim papers, he committed him-

[1] *Baldeo Sahai*, (1879) 2 All. 253.
[2] *Ahad Shah*, (1917) P. R. No. 18 of 1918.
[3] *Umesh Chunder Mitter*, (1888) 16 Cal. 310; *Shib Charan*, (1928) 10 Lah. 253.
[4] *Arura*, (1912) P. L. R. No. 299 of 1913.
[5] *Mansing Daji Patil*, (1913) 15 Bom. L. R. 563, 2 Bom. Cr. C. 80 [illegible] P. R. No. 14 of 1914.

self to a representation of fact which being false to his knowledge must be regarded as an overt act towards the commission of the offence of cheating—an act which had gone beyond the stage of preparation[1]. The accused sent two anonymous letters to the complainant, a well-to-do Mahomedan purporting to come from the Deity at Nagore directing him to pay certain sums of money to a person specified in the letters and threatening him with ruin and death from Divine displeasure if he failed to do so. He showed two more letters to the complainant purporting to have been received by him from the Nagore Deity wherein he was commanded to explain the serious situation and to receive Rs. 300 from the complainant and finally followed it up with a letter saying that that was the last communication that the complainant would receive and that dire consequences would follow without further warning. The complainant complied with the demand though he did not believe the letters. It was held that the accused was guilty of an attempt to cheat[2].

Where the accused informed an *octroi* superintendent that there were sixteen maunds of an article in a cart, whereas there were only six, and by this act he induced the superintendent to grant him a refund of the duty of sixteen maunds of the article instead of six maunds, and where this was discovered before any money was paid to the accused, it was held that the accused was guilty of an attempt to cheat[3]. The accused went into a pawn-broker's shop in the middle of the day, and laid down eleven thimbles on the counter, saying, "I want five shillings on them. The pawn-broker's assistant asked him if they were silver, and he said they were. The assistant tested them, and found they were not silver and in consequence did not give him any money, but sent for a policeman, and gave him into custody. It was held that this amounted to an attempt to obtain money under false pretences[4]. A, who was in the employ of B, a tanner, took skins from a warehouse of B to C, the foreman of B, at another part of the premises, pretending that he had done work on them for which he was to be paid. A intended to return the skins to his master when he had been paid for his pretended work on them. It was held that this was an attempt to obtain money by false pretences and did not amount to larceny[5]. The accused was indicted for attempting to obtain money by false pretences in a begging letter. In reply to the letter the prosecutor sent to the accused 5*s*., but he stated in his evidence at the trial that he knew that the statements contained in the letter were untrue. It was held that the accused might be convicted on this evidence to obtain money by false pretences. The Court said: "As soon as ever the letter was put into the post the offence was committed"[6]. The accused described himself as the principal of the "British Health Institute" [illegible] issued advertisements stating that arrangements had been made for testing [illegible]ine, if desired, at a nominal fee of 1s. 6*d*. Two individuals, who suspected the genuineness of the advertisement, forwarded to the appellant a solution of water with colouring ingredients mixed with soap, and asked for an analysis of their "water". Letters were received from the accused advising a course of treatment to cost not less than one guinea in each case. It was held that the accused was guilty of obtaining money by false pretences even though the person to whom the false pretence was made knew it to be false[7].

Where the accused instigated a *muharrir* to do an illegal thing, viz., to endorse a refund pass for goods not yet arrived, and to take a bribe for such dereliction of duty, it was held that he was guilty of an attempt to cheat because he did not confine his projects to his own breast but confided them to another person whom he tried to make his accomplice[8].

Theft.—The accused entered the complainant's cattle enclosure by making a hole in a thorn-hedge with intent to commit theft of the cattle. It was held that

1 *Maung Po Hmyin*, (1923) 2 Ran. 53.
2 *Doraswamy Ayyar*, (1925) 48 Mad. 774.
3 *Bhagwan Das*, (1905) 2 A. L. J. 718.
4 *William Ball*, (1842) Car. & Mar. 249.
5 *William Holloway*, (1849) 3 Cox 241.
6 *Hensler*, (1870) 11 Cox 570.
7 *Light*, (1915) 24 Cox 718.
8 *Mangal*, (1884) 1 O. D. 129.

[illegible] of an attempt to commit theft, for the attempt began when entry was [illegible] the enclosure by making a hole in the hedge. Accused made his [illegible] an open thorned enclosure in which goats and sheep were kept. He was [illegible] and ran away. It was held that he was guilty of attempt to commit theft.

[illegible] trespass.—Where the accused entered on a verandah and attempted to [illegible] a door, it was held that he was guilty of house trespass.

[illegible] breaking.—The accused commenced to dig a hole in the wall of the [illegible] dwelling house with [illegible] to make their entry into the house [illegible] having so entered to commit theft in the house. The hole was [illegible] completed, that is, it did not completely penetrate from one side of [illegible] to the other, as the accused were interrupted before they could complete it. The [illegible] Magistrate convicted the accused of the offence of attempt to commit house-breaking by night. On appeal, the Sessions Judge acquitted the accused [illegible] the ground that the acts of the accused amounted only to a preparation [illegible] an attempt to commit house-breaking by night. It was held, reversing the [illegible] acquittal, that the accused's acts amounted in law to an attempt [illegible] the actual transaction, the distinct overt act, was begun and [illegible] carried through, though not completed by reason of the accused [illegible] by other people. Where the accused were detected [illegible] as they opened a door and before they actually effected entry into a [illegible] it was held that they were not guilty of house-breaking as the offence of house-breaking could not be committed without entry into the house and so they were [illegible] of an attempt to commit house-breaking.

[illegible] sovereigns.—The accused, a professional melter of gold and silver [illegible] the heated furnace in his workshop with a crucible containing [illegible] [illegible] sovereigns close at hand. He was on these facts found guilty of [illegible] attempting to melt sovereigns punishable under Rule [illegible] of the [illegible] of India Consolidation Rules 1915. It was held that he was guilty of [illegible] to melt sovereigns, for the only act that remained to be performed to complete [illegible] of melting the sovereigns was the final act of putting the sovereigns [illegible] in the crucible.

Abduction.—Where the accused lifted a woman [illegible] to accompany [illegible] from the bed of her husband when she was [illegible] the roof of the [illegible] alarm being given, dropped her there and [illegible] It was held that the offence of abduction was not [illegible] but the accused was guilty of attempt to abduct her.

5. Where no express provision is made by this Code.—This section [illegible] to cases of attempts made punishable by express provisions of the Code. [illegible]

[illegible] Attempts specially provided for are—

(1) [illegible] attempt to wage war against the Queen.

(2) [illegible] attempt wrongfully to restrain the Governor-General and other [illegible] with intent to induce or compel them to exercise or refrain from [illegible] of their lawful powers.

(3) [illegible] attempt to wage war against the Government of any Asiatic Power [illegible] peace with the King.

(4) [illegible] attempt to rescue state prisoners or prisoners of war.

(5) [illegible] attempt by a public servant to obtain [illegible]

[illegible] (1913) [illegible] 21 of 1913.
[illegible] (1916) [illegible] 12 of 1916.
[illegible] 241.
[illegible] (1921) [illegible]
[illegible] (1923) [illegible]
[illegible] 276
[illegible]
[illegible]
[illegible] 447.
[illegible]

Sec. 162, attempt to obtain a gratification in order by corrupt or illegal means to influence a public servant.

Sec. 163, attempt to obtain a gratification for exercising personal influence over a public servant.

Sec. 196, corrupt attempt to use as true, evidence known to be false.

Secs. 198 and 200, corrupt attempt to use as true, a certificate or declaration known to be false in a material point.

Sec. 213, attempt to obtain a gratification to screen an offender from punishment.

Secs. 239 and 240, attempt to induce a person to receive a counterfeit coin.

Sec. 241, attempt to induce a person to receive as genuine a counterfeit coin which, when the offender took it, he did not know to be counterfeit.

Secs. 307 and 308, attempt to commit murder and culpable homicide.

Sec. 309, attempt to commit suicide.

Secs. 385, 387 and 389, attempt to put a person in fear of injury or accusation in order to commit extortion.

Sec. 391, conjoint attempt of five or more persons to commit a robbery.

Secs. 393, 394 and 398, attempt to commit robbery.

Sec. 460, attempt by one of many joint house-breakers by night to cause death or grievous hurt.

6. **'For a term of transportation...which may extend to one-half of the longest term, etc.'**—In calculating fractions of terms of punishment, transportation for life shall be reckoned as equivalent to transportation for twenty years (s. 67).

Section 75.—The offences which fall under this section must be punished entirely irrespective of s. 75[1]. See Comment on s. 75, p. 130.

PRACTICE.

Evidence.—Prove (1) that the accused attempted to commit some offence punishable with transportation or imprisonment under the Indian Penal Code, or that he attempted to cause such offence to be committed.

(2) That in such attempt he did some act towards the commission of that offence.

The Court should be satisfied that the offender had in his mind the design to commit a certain offence, and that he had begun to move towards an execution of his purpose: there must also be proof of some act, not of an ambiguous kind, but directly approximating to the commission of the offence. When the offender's design is made manifest by any such act, it becomes an attempt cognizable as an offence, and punishable under this section.

Procedure.—Same as that for the offence attempted.

Where an accused person has been indicted for committing any offence, the jury may find him not guilty of committing, but guilty of attempting to commit, the offence under this section[2].

Punishment.—A was convicted of an attempt to commit rape, and was sentenced by the Judge to rigorous imprisonment for seven years, which he converted, under s. 59, to transportation for the same term. It was held that, under ss. 376 and 511, a sentence of imprisonment for the offence committed could not be for a longer term than five years, and such sentence could not be converted, under s. 59, to transportation for a longer term[3].

1 *Bharosa*, (1895) 17 All. 123.
2 Criminal Procedure Code, s. 238.
3 *Joseph Meriam*, (1868) 1 Beng. L. R. *(A. Cr.)* 5, 10 W. R. (Cr.) 10.

In the case of a conviction of attempting to commit house-breaking by night with *intent to commit theft, a sentence of whipping was annulled as being illegal*[1].

Charge.—The charge should make mention of this section and the section declaring the punishment for the offence attempted to be committed[2].

It should run thus:—

I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, attempted to commit (*specify the offence attempted*), and in such attempt did a certain act towards the

Magistrate omit these words)] on the said charge.

[1] *Yella valad Parshia*, (1864) 3 B. H. C. (Cr. C.) 37. See the Whipping Act (IV of 1909).

[2] 1 W. R. (Cr L.) 11.

APPENDIX.

THE CHILD MARRIAGE RESTRAINT ACT.

Act No. XIX of 1929.

An Act to restrain the solemnisation of child marriages.

Whereas it is expedient to restrain the solemnisation of child marriages; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called the Child Marriage Restraint Act, 1928.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on the 1st day of April, 1930

Definitions.

2 In this Act, unless there is anything repugnant in the subject or context,—

(a) "child" means a person who, if a male, is under eighteen years of age, and if a female, is under fourteen years of age;

(b) "child marriage" means a marriage to which either of the contracting parties is a child,

(c) "contracting party" to a marriage means either of the parties whose marriage is thereby solemnised; and

(d) "minor" means a person of either sex who is under eighteen years of age.

Punishment for male adult below twenty-one years of age marrying a child.

3 Whoever, being a male above eighteen years of age and below twenty one, contracts a child marriage shall be punishable with fine which may extend to one thousand rupees.

Punishment for male adult above twenty-one years of age marrying a child

4 Whoever, being a male above twenty-one years of age, contracts a child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

Punishment for solemnising a child marriage.

5 Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both, unless he proves that he had reason to believe that the marriage was not a child marriage.

6 (1) Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both:

Punishment for parent or guardian concerned in a child marriage.

Provided that no woman shall be punishable with imprisonment.

(2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that, where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnised.

7 Notwithstanding anything contained in section 25 of the General Clauses Act, 1897, or section 64 of the Indian Penal Code, a Court sentencing an offender under section 3 shall not be competent to direct that, in default of payment of the fine imposed, he shall undergo any term of imprisonment.

Imprisonment not to be awarded for offences under section 3.

8 Notwithstanding anything contained in section 190 of the Code of Criminal Procedure, 1898, no Court other than that of a Presidency Magistrate or a District Magistrate shall take cognizance of, or try, any offence under this Act.

Jurisdiction under this Act.

9 No Court shall take cognizance of any offence under this Act save upon complaint made within one year of the solemnisation of the marriage in respect of which the offence is alleged to have been committed.

Mode of taking cognizance of offences.

10 The Court taking cognizance of an offence under this Act shall unless it dismisses the complaint under section 203 of the Code of Criminal Procedure, 1898, either itself make an inquiry under section 202 of that Code, or direct a Magistrate of the first class subordinate to it to make such inquiry.

Preliminary inquiries into offences under this Act.

11 (1) At any time after examining the complainant and before issuing process for compelling the attendance of the accused, the Court shall, except for reasons to be recorded in writing, require the complainant to execute a bond, with or without sureties, for a sum not exceeding one hundred rupees, as security for the payment of any compensation which the complainant may be directed to pay under section 250 of the Code of Criminal Procedure, 1898; and if such security is not furnished within such reasonable time as the Court may fix, the complaint shall be dismissed.

Power to take security from complainant.

(2) A bond taken under this section shall be deemed to be a bond taken under the Code of Criminal Procedure, 1898, and Chapter XLII of that Code shall apply accordingly.

CONTEMPT OF COURTS ACT.

(ACT No. XII OF 1926).

AN Act to define and limit the powers of certain Courts in punishing contempts of Courts,

WHEREAS doubts have arisen as to the powers of a High Court of Judicature to punish contempts of subordinate Courts;

AND WHEREAS it is expedient to resolve these doubts and to define and limit the powers exercisable by High Courts and Chief Courts in punishing contempts of Court; It is hereby enacted as follows –

Short title, extent and commencement.

1. (*1*) This Act may be called the Contempt of Courts Act, 1926.

(*2*) It shall extend to the whole of British India

(*3*) It shall come into force on such date as the Governor General in Council may, by notification in the Gazette of India, appoint

Power of superior Courts to punish contempts of Court.

2. (*1*) Subject to the provisions of sub-section (*3*), the High Courts of Judicature established by Letters Patent shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of Courts subordinate to them as they have and exercise in respect of contempts of themselves

(*2*) Subject to the provisions of sub-section (*3*), a Chief Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt of itself as a High Court referred to in sub-section (*1*).

(*3*) No High Court shall take cognisance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code.

NOTE.

The publication of comments on a case which is pending trial in a Court amounts to a contempt of Court if the comments are such as are likely to prejudice the administration of justice in the case. A printer cannot escape liability imposed on him by law by [illegible] contract with the owner of the press that he was not to be responsible for [illegible] of th[illegible] [illegible]ations. A journalist should acquaint himself with his duties and liabil[illegible] or[illegible]

a subsequent apology would not be an excuse as a rule[1]. Where the article published is calculated to influence the mind of not only the prosecution witnesses but also the general public and is, therefore highly prejudicial to a fair trial, though very likely no great harm has been actually done, the object of writing being to prejudice the public against the merits of the prosecution, the act amounts to a gross contempt of the Court[2]. It is a gross contempt to attribute to a Judge of the High Court a deplorable lack of experience and sense of responsibility and reasonable want of competence and care as a Judge, and to propose that an enquiry be made into the circumstances under which the "extraordinary" judgment was written because (as was averred) there must have been extraordinary causes for the aberration of the Judge which it was a public duty to expose[3].

Limit of punishment for contempt of Court.

3. Save as otherwise expressly provided by any law for the time being in force, a contempt of Court may be punished with simple imprisonment for a term which may extend to six months, or with fine, which may extend to two thousand rupees, or with both :

Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court.

[1] *Maung Tin Saw*, (1927) 6 Ran. 39.
[2] *Gauri Shankar Viydarthi*, (1928) 11 All. Cr. C. 22.
[3] *D. S Bukhari*, (1927) 29 P. L. R. 294, F.B.

THE ELECTION OFFENCES AND INQUIRIES ACT.

(Act No. XXXIX of 1920).

An Act to provide for the punishment of malpractices in connection with elections, and to make further provision for the conduct of inquiries in regard to disputed elections to legislative bodies constituted under the Government of India Act.

Whereas it is expedient to provide for the punishment of malpractices in connection with elections, and to make further provision for the conduct of inquiries in regard to disputed elections to legislative bodies constituted under the Government of India Act; It is hereby enacted as follows :—

Preliminary.

Short title and extent

1. (1) This Act may be called the Indian Elections Offences and Inquiries Act, 1920, and

(2) It extends to the whole of British India.

PART I.

Amendment of the Indian Penal Code and Code of Criminal Procedure.

[The amendments in the Penal Code are introduced in the text at proper places.]

PART II.

Election inquiries and other matters.

Definitions.

4. In this Part, unless there is anything repugnant in the subject or context,—

(a) "costs" means all costs, charges and expenses of, or incidental to, an inquiry;

(b) "election" means an election to either Chamber of the Indian Legislature or to a Legislative Council constituted under the Government of India Act;

(c) "inquiry" means an inquiry in respect of an election by Commissioners appointed for that purpose by the Governor General, Governor or Lieutenant-Governor;

(d) "pleader" means any person entitled to appear and plead for another in a Civil Court, and includes an advocate, a vakil, and an attorney of a High Court.

Powers of Commissioners.

5. Commissioners appointed to hold an inquiry shall have the powers which are vested in a Court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters :—

(a) discovery and inspection,

(*b*) enforcing the attendance of witnesses, and requiring the deposit of their expenses,

(*c*) compelling the production of documents,

(*d*) examining witnesses on oath,

(*e*) granting adjournments,

(*f*) reception of evidence taken on affidavit, and

(*g*) issuing commissions for the examination of witnesses,

and may summon and examine *suo motu* any person whose evidence appears to them to be material; and shall be deemed to be a Civil Court within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898.

Explanation.—For the purposes of enforcing the attendance of witnesses, the local limits of the Commissioners' jurisdiction shall be the limits of the Province in which the election was held.

Application of Act I of 1872 to inquiries.

6. The provisions of the Indian Evidence Act, 1872 shall, subject to the provisions of this Act, be deemed to apply in all respects to an inquiry.

Documentary evidence.

7. Notwithstanding anything in any enactment to the contrary, no document shall be inadmissible in evidence on the ground that it is not duly stamped or registered.

Obligation of witness to answer any certificate of indemnity.

8. (*1*) No witness shall be excused from answering any question as to any matter relevant to a matter in issue in an inquiry upon the ground that the answer to such question will criminate or may tend, directly or indirectly, to criminate him; or that it will expose, or tend, directly or indirectly, to expose, him to a penalty or forfeiture of any kind:

Provided that—

(*i*) no person who has voted at an election shall be required to state for whom he has voted; and

(*ii*) a witness who, in the opinion of the Commissioners, has answered truly all questions which he has been required by them to answer shall be entitled to receive a certificate of indemnity, and such certificate may be pleaded by such person in any Court and shall be deemed to be a full and complete defence to or upon any charge under Chapter IXA of the Indian Penal Code arising out of the matter to which such certificate relates, nor shall any such answer be admissible in evidence against him in any suit or other proceeding.

(*2*) Nothing in sub-section (*1*) shall be deemed to relieve a person receiving a certificate of indemnity from any disqualification in connection with an election imposed by any law or any rule having the force of law.

Appearance by pleader.

9. Any appearance, application or act before the Commissioners may be made or done by the party in person or by a pleader duly appointed to act on his behalf:

Provided that any such appearance shall, if the Commissioners so direct, be made by the party in person.

Expenses of witnesses

10. The reasonable expenses incurred by any person in attending to give evidence may be allowed by the Commissioners to such person, and shall, unless the Commissioners otherwise direct, be deemed to be part of the costs.

Costs and pleaders' fees, etc.

1. (*1*) Costs shall be in the discretion of the Commissioners, and the Commissioners shall have full power to determine by and to whom and to what extent such costs are to be paid and to include in their report all necessary recommendations for the purposes aforesaid. The Commissioners may allow interest on costs at a rate not exceeding six per cent. per annum, and such interest shall be added to the costs.

(*2*) The fees payable by a party in respect of fees of his adversary's pleader shall be such fees as the Commissioners may allow

Execution of orders as to costs.

12. Any order made by the Governor General or Governor or Lieutenant-Governor on the report of the Commissioners regarding the costs of the inquiry may be produced before the principal Civil Court of original jurisdiction within the local limits of whose jurisdiction any person directed by such order to pay any sum of money has a place of residence or business, or, where such place is within the local limits of the oridinary original civil jurisdiction of a chartered High Court, before the Court of Small Causes having jurisdiction there, and such Court shall execute such order or cause it to be executed in the same manner and by the same procedure as if it were a decree for the payment of money made by itself in a suit.

Disqualification of persons found guilty of election offences

13. Any person who has been convicted of an offence under s. 171E or 171F of the Indian Penal Code or has been disqualified from exercising any electoral right, for a period of not less than five years, on account of malpractices in connection with an election shall be disqualified for five years from the date of such conviction or disqualification from—

(*a*) being appointed to, or acting in, any judicial office;

(*b*) being elected to any office of any local authority when the appointment to such office is by election, or holding or exercising any such office to which no salary is attached;

(*c*) being elected or sitting or voting as a member of any local authority; or

(*d*) being appointed or acting as a trustee of a public trust:

Provided that the Governor General, in the case of an election to the Council of State or the Legislative Assembly, and the Governor or the Lieutenant Governor, in the case of an election to his Legislative Council, may exempt any such person from such disqualification.

Maintenance of secrecy of voting.

14. (*1*) Every officer, clerk, agent or other person who performs any duties in connection with the recording or counting of votes at an election shall maintain and aid in maintaining the secrecy of the voting and shall not (except for some purpose authorized by or under any law) communicate to any person any information calculated to violate such secrecy.

(*2*) Any person who wilfully acts in contravention of the provisions of this section shall be punished with imprisonment of either description for a term not exceeding three months or with fine, or with both.

THE EXPLOSIVE SUBSTANCES ACT.

(ACT No. VI OF 1908).

AN Act further to amend the law relating to explosive substances.

WHEREAS it is necessary further to amend the law relating to explosive substances; It is hereby enacted as follows:—

Short title, extent and application.

1. (1) This Act may be called the Explosive Substances Act, 1908.

(2) It extends to the whole of British India and applies also to—

(a) all native Indian subjects of His Majesty in any place without and beyond British India;

(b) all other British subjects within the territories of any native prince or chief in India.

Definition of "explosive substance".

2. In this Act the expression "explosive substance" shall be deemed to include any materials for making any explosive substance; also any apparatus, machine, implement or material used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance, also any part of any such apparatus, machine or implement.

Punishment for causing explosion likely to endanger life or property.

3. Any person who unlawfully and maliciously causes by any explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property shall, whether any injury to person or property has been actually caused or not, be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment for a term which may extend to ten years, to which fine may be added.

NOTE.

The essence of the offence under this section is the unlawfully and maliciously causing by any explosive substance an explosive of a nature likely to endanger life or to cause serious injury to property[1].

Punishment for attempt to cause explosion, or for making or keeping explosive with intent to endanger life or property.

4. Any person who unlawfully and maliciously—

(a) does any act with intent to cause by an explosive substance, or conspires to cause by an explosive substance, an explosion in British India of a nature likely to endanger life, or to cause serious injury to property; or

(b) makes or has in his possession or under his control any explosive substance with intent by means thereof to endanger life, or cause serious injury

[1] *Chullapalli Ramayya*, (1910) 20 M. L. J. 657, 7 M. L. T. 314, [1910] M. W. N. 77.

NOTE.

Where a complaint was filed by a Sub-Inspector of Police before the Sub-Divisional Magistrate of an offence under s 309 of the Penal Code, and the facts disclosed also an offence under s. 4 (b) of this Act of which the Magistrate could not then take cognizance for want of the consent of Government under s 7 of the Act, and a complaint was subsequently filed by the Superintendent of Police, with such consent obtained, before the Additional District Magistrate, it was held that the latter had jurisdiction to take cognizance of the offence and that the initiation and continuation of the proceedings by him were legal notwithstanding that he had not withdrawn the original case to his own file[1].

1. **'Consent.'**—The consent under this section should state briefly the facts which constitute the offence and authorize the trial of the accused person upon these facts as constituting, in the opinion of the consenting authority, an offence under one or other sections of the Act It is for the Court to decide finally whether upon the facts stated in the order of consent a particular offence has been committed and the mere fact that the consenting authority is of opinion that the facts constitute an offence under one section of the Act, is in itself no bar to a conviction of the person upon the same facts of another offence under another section[2].

[1] *Lalit Chandra Chanda Chowdhury*, (1911) 39 Cal. 119.

[2] *Amar Singh*, (1919) P. R. No. 31 of 1919, 1 L. L. J 173.

THE FUGITIVE OFFENDERS ACT, 1881.

(44 & 45 Vic. c. 69).

An Act to amend the Law with respect to Fugitive Offenders in Her Majesty's Dominions, and for other purposes connected with the trial of offenders.

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows; (that is to say,)

Short title.

1. This Act may be cited as the Fugitive Offenders Act, 1881.

PART I.

Return of Fugitives.

Liability of fugitive to be apprehended and returned.

2. Where a person accused of having committed an offence (to which this part of this Act applies) in one part of Her Majesty's dominions has left that part, such person (in this Act referred to as a fugitive from that part) if found in another part of Her Majesty's dominions, shall be liable to be apprehended and returned in manner provided by this Act to the part from which he is a fugitive.

A fugitive may be so apprehended under an endorsed warrant or a provisional warrant.

Endorsing of warrant for apprehension of fugitive.

3. Where a warrant has been issued in one part of Her Majesty's dominions for the apprehension of a fugitive from that part, any of the following authorities in another part of Her Majesty's dominions in or on the way to which the fugitive is or is suspected to be; (that is to say,)

(1) A judge of a superior court in such part; and

(2) In the United Kingdom a Secretary of State and one of the magistrates of the metropolitan police court in Bow Street; and

(3) In a British possession the governor of that possession,

if satisfied that the warrant was issued by some person having lawful authority to issue the same, may endorse such warrant in manner provided by this Act, the warrant so endorsed shall be a sufficient authority to apprehend the fugitive in the part of Her Majesty's dominions in which it is endorsed, and bring him before a magistrate.

4. A magistrate of any part of Her Majesty's dominions may issue a provisional warrant for the apprehension of a fugitive who is or is suspected of being in or on his way to that part on such information, and under such circumstances, as would in his opinion justify the issue of a warrant if the offence of which the fugitive is accused had been committed within his jurisdiction, and such warrant may be backed and executed accordingly.

Provisional warrant for apprehension of fugitive.

A magistrate issuing a provisional warrant shall forthwith send a report of the issue, together with the information or a certified copy thereof, if he is in the United Kingdom, to a Secretary of State, and if he is in a British possession, to the governor of that possession, and the Secretary of State or governor may, if he think fit, discharge the person apprehended under such warrant.

5. A fugitive when apprehended shall be brought beforea a magistrate, who (subject to the provisions of this Act) shall hear the case in the same manner and have the same jurisdiction and powers, as near as may be (including the power to remand and admit to bail), as if the fugitive were charged with an offence committed within his jurisdiction.

Dealing with fugitive when apprehended.

If the endorsed warrant for the apprehension of the fugitive is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) according to the law ordinarily administered by the magistrate, raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant, and that the offence is one to which this part of this Act applies, the magistrate shall commit the fugitive to prison to await his return, and shall forthwith send a certificate of the committal and such report of the case as he may think fit, if in the United Kingdom to a Secretary of State, and if in a British possession to the governor of that possession.

Where the magistrate commits the fugitive to prison he shall inform the fugitive that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of habeas corpus, or other like process.

A fugitive apprehended on a provisional warrant may be from time to time remanded for such reasonable time not exceeding seven days at any one time as under the circumstances seems requisite for the production of an endorse-warrant.

6. Upon the expiration of fifteen days after a fugitive has been committed to prison to await his return, or if a writ of habeas corpus or other like process is issued with reference to such fugitive by a superior court, after the final decision of the court in the case,

Return of fugitive by warrant.

(1) if the fugitive is so committed in the United Kingdom, a Secretary of State; and

(2) if the fugitive is so committed in a British possession, the governor of that possession,

may, if he thinks it just, by warrant under his hand, order that fugitive to be returned to the part of Her Majesty's dominions from which he is a fugitive, and for that purpose to be delivered into the custody of the persons to whom the warrant is addressed, or some one or more of them, and to be held in custody, and conveyed by sea or otherwise to the said part of Her Majesty's dominions, to be dealt with there in due course of law as if he had been there apprehended, and such warrant shall be forthwith executed according to the tenor thereof.

The governor or other chief officer of any prison, on request of any person having the custody of a fugitive under any such warrant, and on payment or tender of a reasonable amount for expenses, shall receive such fugitive and detain him for such reasonable time as may be requested by the said person for the purpose of the proper execution of the warrant.

Discharge of person apprehended if not returned within one month.

7. If a fugitive who, in pursuance of this part of this Act, has been committed to prison in any part of Her Majesty's dominions to await his return, is not conveyed out of that part within one month after such committal, a superior court, upon application by or on behalf of the fugitive, and upon proof that reasonable notice of the intention to make such application has been given, if the said part is the United Kingdom to a Secretary of State, and if the said part is a British possession to the governor of the possession, may, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody.

Sending back of persons apprehended within six months or acquitted.

8. Where a person accused of an offence and returned in pursuance of this part of this Act to any part of Her Majesty's dominions either is not prosecuted for the said offence within six months after his arrival in that part, or is acquitted of the said offence, then if that part is the United Kingdom a Secretary of State, and if that part is a British possession the governor of that possession, may, if he think fit, on the request of such person, cause him to be sent back free of cost and with as little delay as possible to the part of Her Majesty's dominions in or on his way to which he was apprenhended.

Offences to which this part of this Act applies.

9. This part of this Act shall apply to the following offences, namely, to treason and piracy, and to every offence, whether called felony, misdemeanour, crime, or by any other name, which is for the time being punishable in the part of Her Majesty's dominions in which it was committed, either on indictment or information, by

imprisonment with hard labour for a term of twelve months or more, or by any greater punishment; and for the purposes of this section, rigorous imprisonment, and any confinement in a prison combined with labour, by whatever name it is called, shall be deemed to be imprisonment with hard labour.

This part of this Act shall apply to an offence notwithstanding that by the law of the part of Her Majesty's dominions in or on his way to which the fugitive is or is suspected of being it is not an offence, or not an offence to which this part of this Act applies; and all the provisions of this part of this Act, including those relating to a provisional warrant and to a committal to prison, shall be construed as if the offence were in such last-mentioned part of Her Majesty's dominions an offence to which this part of this Act applies.

Powers of superior court to discharge fugitive when case frivolous or return unjust.

10. Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the court seems just.

Power of Lord Lieutenant in Ireland.

11. In Ireland the Lord Lieutenant or Lords Justices or other chief governor or governors of Ireland, also the chief secretary of such Lord Lieutenant may, as well as a Secretary of State, execute any portion of the powers by this part of this Act vested in a Secretary of State.

PART II.

Inter-colonial Backing of Warrants, and Offences.

Application of part of Act.

Application of part of Act to group of British possessions

12. This part of this Act shall apply only to those groups of British possessions to which, by reason of their contiguity or otherwise, it may seem expedient to Her Majesty to apply the same.

It shall be lawful for Her Majesty from time to time by Order in Council to direct that this part of this Act shall apply to the group of British possessions mentioned in the Order, and by the same or any subsequent Order to except certain offences from the application of this part of this Act, and to limit the application of this part of this Act by such conditions, exceptions, and qualifications as may be deemed expedient.

Backing of Warrants.

Backing in one British possession of warrant issued in another of same group.

13. Where in a British possession of a group to which this part of this Act applies a warrant has been issued for the apprehension of a person accused of an offence punishable by law in that possession, and such person is or is suspected of being in or on the way to another British possession of the same group, a magistrate in the last-mentioned possession, if satisfied that the warrant was issued by a person having lawful authority to issue the same, may endorses uch warrant in manner provided by this Act, and the warrant so endorsed shall be a sufficient authority to apprehend, within the jurisdiction of the endorsing magistrate, the person named in the warrant, and bring him before the endorsing magistrate or some other magistrate in the same British possession.

Return of prisoner apprehended under backed warrant.

14. The magistrate before whom a person so apprehended is brought, if he is satisfied that the warrant is duly authenticated as directed by this Act and was issued by a person having lawful authority to issue the same, and is satisfied on oath that the prisoner is the person named or otherwise described in the warrant, may order such prisoner to be returned to the British possession in which the warrant was issued, and for that purpose to be delivered into the custody of the persons to whom the warrant is addressed, or any one or more of them, and to be held in custody and conveyed by sea or otherwise into the British possession in which the warrant was issued, there to be dealt with according to law as if he had been there apprehended. Such order for return may be made by a warrant under the hand of the Magistrate making it, and may be executed according to the tenor thereof.

A magistrate shall, so far as is requisite for the exercise of the powers of this section, have the same power, including the power to remand and admit to bail a prisoner, as he has in the case of a person apprehended under a warrant issued by him.

Backing in one British possession of summons, etc., of witness issued in another possession of same group.

15. Where a person required to give evidence on behalf of the prosecutor or defendant on a charge for an offence punishable by law in a British possession of a group to which this part of this Act applies, is or is suspected of being in or on his way to any other British possession of the same group, a judge, magistrate, or other officer who would have lawful authority to issue a summons, requiring the attendance of such witness, if the witness were within his jurisdiction, may issue a summons for the attendance of such witness, and a magistrate in any other British possession of the same group, if satisfied that the summons was issued by some judge, magistrate, or officer having lawful authority as aforesaid, may endorse the summons with his name; and the witness, on service in that possession of the summons, so en-endorsed, and on payment or tender of a reasonable amount for his expenses,

shall obey the summons, and in default shall be liable to be tried and punished either in the possession in which he is served or in the possession in which the summons was issued, and shall be liable to the punishment imposed by the law of the possession in which he is tried for the failure of a witness to obey such a summons. The expression "summons" in this section includes any subpœna or other process for requiring the attendance of a witness.

Provisional warrant in group of British possessions

16. A magistrate in a British possession of a group to which this part of this Act applies, before the endorsement in pursuance of this part of this Act of a warrant for the apprehension of any person, may issue a provisional warrant for the apprehension of that person, on such information and under such circumstances as would in his opinion justify the issue of a warrant if the offence of which such person is accused were an offence punishable by the law of the said possession, and had been committed within his jurisdiction, and such warrant may be backed and executed accordingly; provided that a person arrested under such provisional warrant shall be discharged unless the original warrant is produced and endorsed within such reasonable time as may under the circumstances seem requisite.

Discharge of prisoner not returned within one month to British possession of same group.

17. If a prisoner in a British possession whose return is authorised in pursuance of this part of this Act is not conveyed out of that possession within one month after the date of the warrant ordering his return, a magistrate or a superior court upon application by or on behalf of the prisoner, and upon proof that reasonable notice of the intention to make such application has been given to the person holding the warrant and to the chief officer of the police of such possession or of the province or town where the prisoner is in custody, may, unless sufficient cause is shown to the contrary, order such prisoner to be discharged out of custody.

Any order or refusal to make an order of discharge by a magistrate under this section shall be subject to appeal to a superior court.

Sending back of prisoner not prosecuted or acquitted to British possession of same group

18 Where a prisoner accused of an offence is returned in pursuance of this part of this Act to a British possession, and either is not prosecuted for the said offence within six months after his arrival in that possession or is acquitted of the said offence, the governor of that possession, if he thinks fit, may, on the requisition of such person, cause him to be sent back, free of cost, and with as little delay as possible, to the British possession in or on his way to which he was apprehended.

Refusal to return prisoner where offence too trivial

19. Where the return of a prisoner is sought or ordered under this part of this Act, and it is made to appear to a magistrate or to a superior court that by reason of the trivial nature of the case; or by reason of the application for the return of such prisoner

and also every constable, to execute the warrant within the part of Her Majesty's dominions or place within which such endorsement is by this Act made a sufficient authority, by apprehending the person named in it, and bringing him before some magistrate in the said part or place, whether the magistrate named in the endorsement or some other.

For the purposes of this Act every warrant, summons, subpœna, and process, and every endorsement made in pursuance of this Act thereon, shall remain in force, notwithstanding that the person signing the warrant or such endorsement dies or ceases to hold office.

Conveyance of fugitives and witnesses.

27. Where a fugitive or prisoner is authorised to be returned to any part of Her Majesty's dominions in pursuance of Part One or Part Two of this Act, such fugitive or prisoner may be sent thither in any ship belonging to Her Majesty or to any of Her subjects. For the purpose aforesaid, the authority signing the warrant for the return may order the master of any ship belonging to any subject of Her Majesty bound to the said part of Her Majesty's dominions to receive and afford a passage and subsistence during the voyage to such fugitive or prisoner, and to the person having him in custody, and to the witnesses, so that such master be not required to receive more than one fugitive or prisoner for every hundred tons of his ship's registered tonnage, or more than one witness for every fifty tons of such tonnage.

The said authority shall endorse or cause to be endorsed upon the agreement of the ship such particulars with respect to any fugitive prisoner or witness sent in her as the Board of Trade from time to time require. Every such master shall, on his ship's arrival in the said part of Her Majesty's dominions, cause such fugitive or prisoner, if he is not in the custody of any person, to be given into the custody of some constable, there to be dealt with according to law.

Every master who fails on payment or tender of a reasonable amount for expenses to comply with an order made in pursuance of this section, or to cause a fugitive or prisoner committed to his charge to be given into custody as required by this section, shall be liable on summary conviction to a fine not exceeding fifty pounds, which may be recovered in any part of Her Majesty's dominions in like manner as a penalty of the same amount under the Merchant Shipping Act, 1854, and the Acts amending the same.

Escape of prisoner from custody.

28. If a prisoner escape, by breach of prison or otherwise, out of the custody of a person acting under a warrant issued or endorsed in pursuance of this Act, he may be retaken in the same manner as a person accused of a crime against the law of that part of Her Majesty's dominions to which he escapes may be retaken upon an escape.

A person guilty of the offence of escaping or of attempting to escape, or of aiding or attempting to aid a prisoner to escape, by breach of prison or otherwise, from custody under any warrant issued or endorsed in pursuance of this Act, may be tried in any of the following parts of Her Majesty's dominions, namely, the part to which and the part from which the prisoner is being removed, and the part in which the prisoner escapes and the part in which the offender is found.

Evidence.

Depositions to be evidence, and authentication of depositions and warrants.

29. A magistrate may take depositions for the purposes of this Act in the absence of a person accused of an offence in like manner as he might take the same if such person were present and accused of the offence before him.

Depositions (whether taken in the absence of the fugitive or otherwise) and copies thereof, and official certificates of or judicial documents stating facts, may, if duly authenticated, be received in evidence in proceedings under this Act.

Provided that nothing in this Act shall authorise the reception of any such depositions, copies, certificates, or documents in evidence against a person upon his trial for an offence

Warrants and depositions, and copies thereof, and official certificates of or judicial documents stating facts, shall be deemed duly authenticated for the purposes of this Act if they are authenticated in manner provided for the time being by law, or if they purport to be signed by or authenticated by the signature of a judge, magistrate, or officer of the part of Her Majesty's dominions in which the same are issued, taken, or made, and are authenticated either by the oath of some witness, or by being sealed with the official seal of a Secretary of State, or with the public seal of a British possession, or with the official seal of a Governor of a British possession, or of a Colonial Secretary, or of some Secretary or minister administering a department of the Government of a British possession.

And all courts and magistrates shall take judicial notice of every such seal as is in this section mentioned, and shall admit in evidence without further proof the documents authenticated by it.

Miscellaneous.

Provisions as to exercise of jurisdiction by magistrates.

30. The jurisdiction under Part One of this Act to hear a case and commit a fugitive to prison to await his return shall be exercised,—

(1) In England, by a chief magistrate of the metropolitan police courts or one of the other magistrates of the metropolitan police court at Bow Street; and

(2) In Scotland, by the sheriff or sheriff substitute of the county of Edinburgh; and

(3) In Ireland, by one of the police magistrates of the Dublin metropolitan police district; and

(4) In a British possession, by any judge, justice of the peace, other officer having the like jurisdiction as one of the magistrates of the metropolitan police court in Bow Street, or by such other court, judge, or magistrate as may be from time to time provided by an Act or ordinance passed by the legislature of that possession.

If a fugitive is apprehended and brought before a magistrate who has no power to exercise the jurisdiction under this Act in respect of that fugitive, that magistrate shall order the fugitive to be brought before some magistrate having that jurisdiction, and such order shall be obeyed.

Power as to making and revocation of Orders in Council.

31. It shall be lawful for Her Majesty in Council from time to time to make Orders for the purposes of this Act, and to revoke and vary any Order so made, and every Order so made shall, while it is in force have the same effect as if it were enacted in this Act.

An Order in Council made for the purposes of this Act shall be laid before Parliament as soon as may be after it is made if Parliament is then in session, or if not, as soon as may be after the commencement of the then next session of Parliament.

Power of legislature of British possession to pass laws for carrying into effect this Act.

32. If the legislature of a British possession pass any Act or ordinance—

(1) For defining the offences committed in that possession to which this Act or any part thereof is to apply; or

(2) For determining the court, judge, magistrate, officer, or person by whom and the manner in which any jurisdiction or power under this Act is to be exercised; or

(3) For payment of the costs incurred in returning a fugitive or a prisoner, or in sending him back if not prosecuted or if acquitted, or otherwise, in the execution of this Act; or

(4) In any manner for the carrying of this Act or any part thereof into effect in that possession,

it shall be lawful for Her Majesty by Order in Council to direct, if it seems to Her Majesty in Council necessary or proper for carrying into effect the objects of this Act, that such Act or Ordinance, or any part thereof, shall with or without modification or alteration be recognised and given effect to throughout Her Majesty's dominions and on the high seas as if it were part of this Act.

Application of Act.

Application of Act to offences at sea or triable in several parts of Her Majesty's dominions.

33. Where a person accused of an offence can, by reason of the nature of the offence, or of the place in which it was committed, or otherwise, be, under this Act or otherwise, tried for or in respect of the offence in more than one part of Her Majesty's dominions, a warrant for the apprehension of such person may be issued in any part of Her Majesty's dominions in which he can, if he happens to be there, be tried; and each part of this Act shall apply as if the offence had been committed in the part of Her Majesty's dominions where such warrant is issued, and such person may be apprehended and returned in pursuance of this Act, notwithstanding that in the place in which he is apprehended a Court has jurisdiction to try him

Provided that if such person is apprehended in the United Kingdom a Secretary of State, and if he is apprehended in a British possession, the governor of such possession, may, if satisfied that having regard to the place where the witnesses for the prosecution and for the defence are to be found, and to all the circumstances of the case, it would be conducive to the interests of justice so to do, order such person to be tried in the part of Her Majesty's dominions in which he is apprehended, and in such case any warrant previously issued for his return shall not be executed.

Application of Act to convicts.

34 Where a person convicted by a Court in any part of Her Majesty's dominions of an offence committed either in Her Majesty's dominions or elsewhere, is unlawfully at large before the expiration of his sentence, each part of this Act shall apply to such person, so far as is consistent with the tenor thereof, in like manner as it applies to a person accused of the like offence committed in the part of Her Majesty's dominions in which such person was convicted.

Application of Act to removal of person triable in more than one part of Her Majesty's dominions

35 Where a person accused of an offence is in custody in some part of Her Majesty's dominions, and the offence is one for or in respect of which, by reason of the nature thereof or of the place in which it was committed or otherwise, a person may under this Act or otherwise be tried in some other part of Her Majesty's dominions, in such case a superior court, and also if such person is in the United Kingdom a Secretary of State, and if he is in a British possession the Governor of that possession, if satisfied that, having regard to the place where the witnesses for the prosecution and for the defence are to be found, and to all the circumstances of the case, it would be conducive to the interests of justice so to do, may by warrant direct the removal of such offender to some other part of Her Majesty's dominions in which he can be tried, and the offender may be returned, and, if not prosecuted or acquitted, sent back free of cost in like manner as if he were a [illegible] re[illegible]

in pursuance of Part One of this Act, and the warrant were a warrant for the return of such fugitive, and the provisions of this Act shall apply accordingly.

Application of Act to foreign jurisdiction.

36. It shall be lawful for Her Majesty from time to time by Order in Council to direct that this Act shall apply as if, subject to the conditions, exceptions, and qualifications (if any) contained in the Order, any place out of Her Majesty's dominions in which Her Majesty has jurisdiction, and which is named in the Order, were a British possession, and to provide for carrying into effect such application.

Application of Act to, and execution of warrant in, United Kingdom, Channel Islands and Isle of Man.

37. This Act shall extend to the Channel Islands and Isle of Man as if they were part of England and of the United Kingdom, and the United Kingdom and those Islands shall be deemed for the purpose of this Act to be one part of Her Majesty's dominions; and a warrant endorsed in pursuance of Part One of this Act may be executed in every place in the United Kingdom and the said Islands accordingly.

Application of Act to past offences.

38. This Act shall apply where an offence is committed before the commencement of this Act, or, in the case of Part Two of this Act, before the application of that part to a British possession or to the offence, in like manner as if such offence had been committed after such commencement or application.

Definitions and Repeal.

possession means any person having authority to issue a warrant for the apprehension of persons accused of offences and to commit such persons for trial:

"Offence punishable on indictment".

The expression "offence punishable on indictment" means, as regards India, an offence punishable on a charge or otherwise:

"Oath":

The expression "oath" includes affirmation or declaration in the case of persons allowed by law to affirm or declare instead of swearing, and the expression "swear" and other words relating to an oath or swearing shall be construed accordingly:

"Deposition".

The expression "deposition" includes any affidavit, affirmation, or statement made upon oath as above defined:

"Superior court":

The expression "superior court" means:

(1) In England, Her Majesty's Court of Appeal and High Court of Justice; and

(2) In Scotland, the High Court of Justiciary; and

(3) In Ireland, Her Majesty's Court of Appeal and Her Majesty's High Court of Justice at Dublin; and

(4) In a British possession, any court having in that possession the like criminal jurisdiction to that which is vested in the High Court of Justice in England, or such court or judge as may be determined by any Act or Ordinance of that possession.

Commencement of Act

40. This Act shall come into operation on the first day of January one thousand eight hundred and eighty-two, which date is in this Act referred to as the commencement of this Act

Repeal of Act in Schedule.

41. The Act specified in the Schedule to this Act is hereby repealed as from the commencement of this Act:

Provided that this repeal shall not affect—

(*a*) Any warrant duly endorsed or issued, nor anything duly done or suffered before the commencement of this Act, nor

(*b*) Any obligation or liability incurred under an enactment hereby repealed; nor

(*c*) Any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment hereby repealed; nor

(*d*) Any legal proceeding or remedy in respect of any such warrant obligation, liability, penalty, forfeiture, or punishment as aforesaid; and any such warrant may be endorsed and executed, and any such legal proceeding and remedy may be carried on, as if this Act had not passed.

SCHEDULE

Year & Chapter	Title.
6 & 7 Vict, c 34	An Act for the better apprehension of certain offenders.

THE INDIAN CRIMINAL LAW AMENDMENT ACT.

(ACT No. XIV OF 1908.)

AN ACT to provide for the more speedy trial of certain offences, and for the prohibition of associations dangerous to the public peace.

WHEREAS it is expedient to provide for the more speedy trial of certain offences, and for the prohibition of associations dangerous to the public peace; It is hereby enacted as follows :—

Short title and extent.

1. *(1)* This Act may be called the Indian Criminal Law Amendment Act, 1908.

(2) It extends to the Provinces of Bengal and of Eastern Bengal and Assam; but the Local Government of any other Provinces may, at any time, by notification in the official Gazette, extend the whole or any Part thereof to that Province.

[*Clause (3) repealed by Act V of 1922, s. 3*].

[Clause (2) was amended by Act XXXVIII of 1920].

PART I.

[*Repealed by Act V of 1922, s. 3.*)

PART II.

UNLAWFUL ASSOCIATIONS.

Definitions.

15. In this Part—

(1) "association" means any combination or body of persons, whether the same be known by any distinctive name or not; and

(2) "unlawful association" means an association—

(a) which encourages or aids persons to commit acts of violence or intimidation or of which the members habitually commit such acts, or

(b) which has been declared to be unlawful by the Local Government[1] under the powers hereby conferred.

Power to declare association unlawful.

16. If the Local Government[1] is of opinion that any association interferes or has for its object interference with the administration of the law or with the maintenance of law and order, or that it constitutes a danger to the public peace, the Local Government[1] may, by notification in the official Gazette, declare such association to be unlawful.

Penalties.

17. *(1)* Whoever is a member of an unlawful association, or takee part in meetings of any such association, or contributes or receives or solicits any contribution for the purpose of any such association, or in any way assists the operations of any such association,

1 Substituted for the words "Governor General in Council" by Act XXXVIII of 1920, s. 2.

shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both.

(2) Whoever manages or assists in the management of an unlawful association, or promotes or assists in promoting a meeting of any such association, or of any members thereof as such members, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

NOTE.

The accused visited a village and addressed the people at the village gate. He stated that the British *raj* had come to an end or at any rate was about to do so, and exhorted the people to hold a *diwan* and take steps to establish an independent State at that village. After staying at the village for two or three days he went away and immediately after his departure an unlawful association was formed of which his son was made the Secretary, and his brother, the Vice-President, other office-holders being also appointed. The accused also told the people that he had given Rs. 2,000 towards the movement which had been paid to his son and people could go to the latter to have their names registered. It appeared that Rs 860 had actually been paid by the accused to his son at that time, which payment was apparently made as a subscription and for the purpose of being utilized for the objects of the association, the formation of which the accused was advocating. The question was whether the accused's words and actions constituted an offence under this Act, or the Penal Code. It was held that the accused's act did not come within the purview of either clause (1) or (2) of s 17 of this Act, as he did not contribute to the funds or assist in the management of an *existing* association. It was held, however, that the accused 'instigated' the formation of an association which was unlawful under s 15 (2) (a) of this Act, and therefore abetted its formation (ss. 107 and 108 of the Indian Penal Code) and as any one becoming a member of that association or contributing funds to it would be guilty of an offence under s. 17 (1) of this Act, accused's act amounted to an abetment of an offence. It was further held that as this abetment was of the commission of an offence by a class of persons exceeding ten, the accused had brought himself within the ambit of s. 117 of the Penal Code and was liable to the punishment provided therein[1].

Continuance of association

18. An association shall not be deemed to have ceased to exist by reason only of any formal act of dissolution or change of title, but shall be deemed to continue so long as any actual combination for the purposes of such association continues between any members thereof.

THE SCHEDULE.

(Repealed by Act V of 1922, s. 3.)

[1] *Mihan Singh*, (1923) 5 Lah. 1.

THE INDIAN EXTRADITION ACT.

(ACT XV OF 1903.)

AN Act to consolidate and amend the law relating to the Extradition and Rendition of Criminals.

Whereas it is expedient to provide for the more convenient administration in British India of the Extradition Acts, 1870 and 1873, and of the Fugitive Offenders Act, 1881;

And whereas it is also expedient to amend the law relating to the extradition of criminals in cases to which the Extradition Acts, 1870 and 1873, do not apply;

It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title.

1. (*1*) This Act may be called the Indian Extradition Act, 1903.

extent and commencement.

(*2*) It extends to the whole of British India (including British Baluchistan, the Santhal Parganas and the Parganas of Spitie); and

(*3*) It shall come into force on such day as the Governor General in Council by notification in the Gazette of India, may direct.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "European British subject" means a European British subject as defined by the Code of Criminal Procedure for the time being in force:

(*b*) "extradition offence" means any such offence as is described in the first schedule:

(*c*) "Foreign State" means a State to which, for the time being, the Extradition Acts, 1870 and 1873, apply:

(*d*) "High Court" means the High Court as defined by the Code of Criminal Procedure for the time being in force:

(*e*) "offence" includes any act wheresoever committed which would, if committed in British India, constitute an offence: and

(*f*) "rules" include prescribed forms.

NOTE.

Clause (a).—A European British subject does not cease to be a European British subject by her marriage with an Indian subject of a Native State of India; nor does she cease to be such by her domicile in a Native State of India[1].

Clause (c).—Chandranagore is a 'Foreign State' as defined by this clause, and the provisions of Chapter II thereof must be followed before a fugitive offender can be surrendered to the French authorities[2].

Clause (e).—As to the wider interpretation assigned to the word 'offence' see *Adams*[3].

[1] *Bai Aisha*, (1928) 31 Bom. L. R. 62.

[2] *Cullington*, (1920) 48 Cal. 328.

[3] (1903) 26 Mad. 607.

CHAPTER II.

SURRENDER OF FUGITIVE CRIMINALS IN CASE OF FOREIGN STATES.

Requisition for surrender.

3. (*1*) Where a requisition is made to the Government of India or to any Local Government by the Government of any Foreign State for the surrender of a fugitive criminal of that State who is in, or who is suspected of being in British India, the Government of India or the Local Government, as the case may be, may, if it thinks fit, issue an order to any Magistrate who would have had jurisdiction to inquire into the crime if it had been an offence committed within the local limits of his jurisdiction, directing him to inquire into the case.

NOTE.

An order issued under this sub-section by the Government of Bengal upon a requisition made to the Government of India is held to be invalid, and cannot be "ratified" by a subsequent order of the Government of India. Where, however, the latter order directs the Magistrate in pursuance of the former order "and of the statutory provisions in that behalf to enquire into the said case", the Government gives valid effect to its intention, and the Magistrate has jurisdiction to enquire. The only Government competent to issue the order for inquiry is the Government to whom the foreign State has made a requisition. This function must be performed strictly, and cannot be delegated[1].

Summons or warrant for arrest.

(*2*) The Magistrate so directed shall issue a summons or warrant for the arrest of the fugitive criminal according as the case appears to be one in which a summons or warrant would ordinarily issue.

Inquiry by Magistrate.

(*3*) When such criminal appears or is brought before the Magistrate, the Magistrate shall inquire into the case in the same manner and have the same jurisdiction and powers, as nearly as may be, as if the case were one triable by the Court of Session or High Court, and shall take such evidence as may be produced in support of the requisition and on behalf of the fugitive criminal, including any evidence to show that the crime of which such criminal is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime.

Committal

(*4*) If the Magistrate is of opinion that a *prima facie* case is made out in support of the requisition, he may commit the fugitive criminal to prison to await the orders of the Government of India or the Local Government, as the case may be.

NOTE.

The Magistrate must report the case to the Local Government[2].

Bail.

(*5*) If the Magistrate is of opinion that a *prima facie* case is not made out in support of the requisition, or if the case is one which is bailable under the provisions of the Code of Criminal Procedure for the time being in force, the Magistrate may release the fugitive criminal on bail.

[1] *Rudolf Stallmann*, (1911) 39 Cal 164 [2] *Ram Sahai*, (1868) P. R. No. 79

NOTE.

The High Court has the fullest discretion, having regard to the provisions relating to bail in the Criminal Procedure Code, to grant bail to a prisoner against whom proceedings are pending under this Act[1].

Magistrate's report.

(6) The Magistrate shall report the result of his inquiry to the Government of India, or the Local Government, as the case may be, and shall forward, together with such report, any written statement which the fugitive criminal may desire to submit for the consideration of the Government.

NOTE.

This sub-section is not a substitute for and does not interfere with proceedings taken under s. 491 of the Code of Criminal Procedure. Section 491 is applicable to cases under this Act[2].

Reference to High Court if Government thinks necessary.

(7) If the Government of India or the Local Government, as the case may be, is of opinion that such report or written statement raises an important question of law, it may make an order referring such question of law to such High Court as may be named in the order, and the fugitive criminal shall not be surrendered until such question has been decided.

Warrant for surrender.

(8) If, upon receipt of such report and statement or upon the decision of any such question, the Government of India or the Local Government, as the case may be, is of opinion that the fugitive criminal ought to be surrendered, it may issue a warrant for the custody and removal of such criminal and for his delivery at a place and to a person to be named in the warrant.

Lawfulness of custody and retaking under warrant for surrender.

(9) It shall be lawful for any person to whom a warrant is directed in pursuance of sub-section (8), to receive, hold in custody and convey the person mentioned in the warrant, to the place named in the warrant, and, if such person escapes out of any custody to which he may be delivered in pursuance of such warrant, he may be re-taken as a person accused of an offence against the law of British India may be re-taken upon an escape.

Discharge of fugitive criminals committed to prison after two months.

(10) If such a warrant as is prescribed by sub-section (8) is not issued and executed in the case of any fugitive criminal, who has been committed to prison under sub-section (4), within two months after such committal, the High Court may, upon application made to it on behalf of such fugitive criminal and upon proof that reasonable notice of the intention to make such application has been given to the Government of India or the Local Government, as the case may be, order such criminal to be discharged, unless sufficient cause is shown to the contrary.

1 *Rudolf Stallmann*, (1911) 39 Cal. 164.

2 *Ibid*, distinguishing *Rudolf Stallmann*, (1911) 38 Cal. 547.

NOTE.

A Magistrate is not warranted in keeping people in custody on a mere allegation that criminal proceedings against them are pending in a foreign state. Unless proper steps be taken against persons detained under the Act, they must be released[1].

Power to Magistrate to issue warrant of arrest in certain cases.

4. (1) Where it appears to any Magistrate of the first class or any Magistrate specially empowered by the Local Government in this behalf that a person within the local limits of his jurisdiction is a fugitive criminal of a Foreign State, he may, if he thinks fit, issue a warrant for the arrest of such person, on such information or complaint and on such evidence as would, in his opinion, justify the issue of a warrant if the crime of which he is accused or has been convicted had been committed within the local limits of his jurisdiction.

NOTE.

A Magistrate may issue a warrant when the person to be arrested is within his jurisdiction. Section 4 merely provides a preliminary procedure. Under it an arrest may be effected before the receipt of the requisition mentioned in s. 3, otherwise the criminal might escape. The two sections do not overlap[2].

Issue of warrant to be reported forthwith.

(2) The Magistrate shall forthwith report the issue of a warrant under this section to the Local Government.

Person arrested not to be detained unless order received.

(3) A person arrested on a warrant issued under this section shall not be detained more than two months unless within that period the Magistrate receives an order made with reference to such person under section 3, sub-section (1).

Bail.

(4) In the case of a person arrested or detained under this section the provisions of the Code of Criminal Procedure for the time being in force relating to bail shall apply in the same manner as if such person were accused of committing in British India the crime of which he is accused or has been convicted.

Power of Government to refuse to issue order under section 3 when crime of political character.

5 (1) If the Government of India or any Local Government is of opinion that the crime of which any fugitive criminal of a Foreign State is accused or alleged to have been convicted is of a political character, it may, if it thinks fit, refuse to issue any order under section 3, sub-section (1).

Power of Government to discharge any person in custody at any time.

(2) The Government of India or the Local Government may also at any time stay any proceedings taken under this Chapter and direct any warrant issued under this Chapter to be cancelled and the person for whose arrest such warrant has been issued to be discharged.

References to "Police Magistrate" and "Secretary of State" in section 3 of Extradition Act, 1870.

6. The expressions "the Police Magistrate" and "the Secretary of State" in section 3 of the Extradition Act, 1870, shall be read as referring respectively to the Magistrate directed to inquire into a case under section 3 of this Act, and to the Government of India or the Local Government, as the case may be.

[1] *Kaladgi Magistrate's Return*, (1877) Unrep. Cr. C. 124.

[2] *Rudolf Stallman*, (1911)

CHAPTER III.

SURRENDER OF FUGITIVE CRIMINALS IN CASE OF STATES OTHER THAN FOREIGN STATES.

Issue of warrant by Political Agents in certain cases.

7. (*1*) Where an extradition offence has been committed or is supposed to have been committed by a person, not being a European British subject, in the territories of any State not being a Foreign State and such person escapes into or is in British India, and the Political Agent in or for such State issues a warrant, addressed to the District Magistrate of any district in which such person is believed to be, or if such person is believed to be in any Presidency-town to the Chief Presidency Magistrate of such town, for his arrest and delivery at a place and to a person or authority indicated in the warrant, such Magistrate shall act in pursuance of such warrant and may give directions accordingly.

NOTE.

Extradition is only a means of bringing the accused before the tribunal having jurisdiction. Extradition proceedings could never limit the jurisdiction of the Court if there is nothing on the face of the proceedings to warrant the conclusion that any limitation has been imposed. The mere circumstance that one particular offence is mentioned when extradition is demanded does not necessarily lead to the conclusion that extradition is allowed for the purpose of the trial only on that charge, and on no other charge whatever. And in any event it could not exclude a trial and conviction on any charge, which the facts disclosed in the extradition proceedings would suffice to sustain[1].

A District Magistrate who is addressed with a view to the execution of a warrant issued by a Political Agent of a Native State under clause (1) of this section must act in pursuance of such warrant and has no authority to ascertain whether a prima facie case exists against the accused or not[2]. Where a warrant has been issued by the Political Agent under this section its execution by the District Magistrate or Chief Presidency Magistrate in British India, in accordance with the Act, is according to the Calcutta High Court[3] an executive act, and the High Court cannot interfere in revision with the proceedings of the Magistrate and the order to surrender the fugitive criminal, but if the latter considers himself aggrieved thereby, he can invoke the action of the Government under s. 15. The Bombay High Court[4] has, however, dissented from the above view and held that it is a judicial order, which can be revised by the High Court either under s. 439 or s. 561A, or interfered with under s. 491 of the Criminal Procedure Code. The view of the Patna High Court[5] is in agreement with the Bombay view.

On a requisition made to him by a Native State, the Political Agent, who was also a District Magistrate, issued a warrant under this section to arrest the accused. The latter surrendered of his own accord and the warrant was returned unexecuted. The Political Agent then issued a certificate under s. 188 of the Criminal Procedure Code, 1898, that the accused should be tried in British India. Subsequently, the State authorities pressed for the accused's surrender, and the Political Agent accordingly ordered the accused to be handed over to the State for trial It was held that it was not open to the Political Agent to re-call the certificate issued by him under s. 188 of the Criminal Procedure Code, 1898, and that the order passed by him allowing the trial in the Native State was unsustainable[6].

Power to grant bail.—A British Indian Magistrate to whom a warrant has been addressed under this section has no power to admit to bail a person arrested under it apart from the provisions of ss. 8 and 8A[7].

1 *Khoda Uma*, (1892) 17 Bom. 369, 374, 375.
2 *Giyan Chand*, (1908) P. R. No. 3 of 1909.
3 *Gulli Sahu*, (1914) 42 Cal. 793.
4 *Bai Aisha*, (1928) 31 Bom. L. R. 62.
5 *Jaipal Bhagat*, (1921) 1 Pat. 57.
6 *Vazirsaheb Allisaheb Jhagirdar*, (1912) 14 Bom. L. R. 377, 1 Bom. Cr. C. 140.
7 *Murlidhar Bhagwandas*, (1918) 20 Bom. L. R. 1009, 4 Bom. Cr. C. 304.

Execution of such warrant.

(2) A warrant issued as mentioned in sub-section (*1*) shall be executed in the manner provided by the law for the time being in force with reference to the execution of warrants, and the accused person, when arrested, shall be produced before the District Magistrate or Chief Presidency Magistrate, as the case may be, who shall record any statement made by him; such accused person shall then, unless released in accordance with the provisions of this Act, be forwarded to the place and delivered to the person or authority indicated in the warrant.

NOTE.

Where the accused were charged with receiving property stolen in the commission of a dacoity in Indore but it appeared that the property was received in British India, it was held that the accused could not be surrendered under the warrant of the Political Agent[1]

Proclamation and attachment in case of persons absconding.

(3) The provisions of the Code of Criminal Procedure for the time being in force in relation to proclamation and attachment in the case of persons absconding shall, with any necessary modifications, apply where any warrant has been received by a District Magistrate or Chief Presidency Magistrate under this section as if the warrant had been issued by himself.

Release on giving security.

8. (*1*) Where a Political Agent has directed by endorsement on any such warrant that the person for whose arrest it is issued may be released on executing a bond with sufficient sureties for his attendance before a person or authority indicated in this behalf in the warrant at a specified time and place, the Magistrate to whom the warrant is addressed shall on such security being given release such person from custody.

Magistrate to retain bond.

(*2*) When security is taken under this section, the Magistrate shall certify the fact to the Political Agent who issued the warrant, and shall retain the bond.

Re-arrest in case of default.

(*3*) If the person bound by any such bond does not appear at the time and place specified, the Magistrate may, on being satisfied as to his default, issue a warrant directing that he be re-arrested and handed over to any person authorized by the Political Agent to take him into custody.

Deposit in lieu of bond, and forfeiture of bonds.

(*4*) In the case of any bond executed under this section, the Magistrate may exercise the powers conferred by the Code of Criminal Procedure for the time being in force in relation to taking a deposit in lieu of the execution of a bond and with respect to the forfeiture of bonds and the discharge of sureties.

[1] *Hukam Chand*, (1873) P. R. No. 14 of 1873.

NOTE.

Where a person was arrested upon a warrant issued by a Political Agent under this Act, and was placed before a Magistrate, and such Magistrate passed an order releasing him on bail and directing him to appear before the Political Agent on a certain date, although there was no endorsement on the warrant, giving the Magistrate power to pass such an order, it was held that in the absence of such an endorsement under this section the Magistrate had no authority to pass such an order[1].

Power to report case for orders of local Government.

8A. Notwithstanding anything contained in section 7, sub-section (2), or in section 8, when an accused person arrested in accordance with the provisions of section 7 is produced before the District Magistrate or Chief Presidency Magistrate, as the case may be, and the statement (if any) of such accused person has been recorded, such Magistrate may, if he thinks fit, before proceeding further report the case to the Local Government and, pending the receipt of orders on such report may detain such accused person in custody or release him on his executing a bond with sufficient sureties for his attendance when required[2].

Requisitions by States not being Foreign States.

9. Where a requisition is made to the Government of India or to any Local Government by or on behalf of any State not being a Foreign State, for the surrender of any person accused of having committed an offence in the territories of such State, such requisition shall (except in so far as relates to the taking of evidence to show that the offence is of a political character or is not an extradition crime) be dealt with in accordance with the procedure prescribed by section 3 for requisitions made by the Government of any Foreign State as if it were a requisition made by any such Government under that section :

Provided that, if there is a Political Agent in or for any such State, the requisition shall be made through such Political Agent.

NOTE.

This section only applies when a requisition has been made to the Government of India or to a Local Government and not when a warrant has been addressed to the District Magistrate[3].

Power to Magistrates to issue warrants of arrest in certain cases.

10. (*1*) If it appears to any Magistrate of the first class or any Magistrate empowered by the Local Government in this behalf that a person within the local limits of his jurisdiction is accused or suspected of having committed an offence in any State not being a Foreign State and that such person may lawfully be surrendered to such State, or that a warrant may be issued for his arrest under section 7, the Magistrate may, if he thinks fit, issue a warrant for the arrest of such person on such information or complaint and on such evidence as would, in his opinion, justify the issue of a warrant if the offence had been committed within the local limits of his jurisdiction.

1 *Raj Kumar Dutt* v. *Tothal Sijo*, (1907) 12 C. W. N. 602, 7 C. L. J. 171.

2 This section was added by Act I of 1913, s. 3.

3 *Jaipal Bhagat*, (1921) 1 Pat. 57.

Issue of warrant to be reported forthwith.

(2) The Magistrate shall forthwith report the issue of a warrant under this section, if the offence appears or is alleged to have been committed in the territories of a State for which there is a Political Agent, to such Political Agent, and in other cases to the Local Government.

Limit of time of detention of person arrested.

(3) A person arrested on a warrant issued under this section shall not, without the special sanction of the local Government, be detained more than two months, unless within such period the Magistrate receives an order made with reference to such person in accordance with the procedure prescribed by section 9, or a warrant for the arrest of such person under section 7.

Bail.

(4) In the case of a person arrested or detained under this section, the provisions of the Code of Criminal Procedure for the time being in force relating to bail shall apply in the same manner as if such person were accused of committing in British India the offence with which he is charged.

NOTE.

This section applies only if the warrant issued under s. 7 is legal, but absconding from jail not being one of the offences mentioned in Schedule I of this Act, a warrant for arrest on such a charge does not fall within s 7[1] Where a person is arrested without a warrant either under s 54 (g) of the Criminal Procedure Code or under s 33 (g) of the Bombay City Police Act, 1902, and detained by a Magistrate under s 23 of this Act, such Magistrate has power to release the arrested person on bail under s. 10 (4) of this Act[2].

Surrender of person accused of, or undergoing sentence for, offence in British India.

11. (1) A person accused of an offence committed in British India, not being the offence for which his surrender is asked, or undergoing sentence under any conviction in British India, shall not be surrendered in compliance with a warrant issued by a Political Agent under section 7 or a requisition made by or on behalf of any State not being a Foreign State under section 9, except on the condition that such person be re-surrendered to the Government of India or the Local Government, as the case may be, on the termination of his trial for the offence for which his surrender has been asked:

Provided that no such condition shall be deemed to prevent or postpone the execution of a sentence of death lawfully passed.

Suspension of sentence on surrender.

(2) On the surrender of a person undergoing sentence under a conviction in British India, his sentence shall be deemed to be suspended until the date of his re-surrender, when it shall revive and have effect for the portion thereof which was unexpired at the time of his surrender.

[1] *Jaipal Bhagat*, (1921) 1 Pat. 57.

[2] *Shriram Shambudayal*, (1924) 26 Bom. L. R. 984, 7 Bom. Cr C. 227.

Trade Descriptions.

4. (*1*) The provisions of this Act respecting the application of a false trade description to goods or respecting goods to which a false trade description is applied, shall extend to the application of goods of any such numerals, words or marks, or arrangement or combination thereof, whether including a trade mark or not, as are or is reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are and to goods having such numerals, words or marks, or arrangement or combination, applied thereto.

Provisions supplemental to the definition of false trade description.

(*2*) The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression false name or initials means as applied to any goods any name or initials—

(*a*) not being a trade mark, or part of a trade mark, and

(*b*) being identical with, or a colourable imitation of, the name or initials of a person carrying on business in connection with goods of the same description and not having authorised the use of such name or initials.

(*3*) A trade description which denotes or implies that there are contained in any goods to which it is applied more yards, feet or inches than there are contained therein standard yards, standard feet or standard inches is a false trade description.

Application of trade descriptions.

5. (*1*) A person shall be deemed to apply a trade description to goods who—

(*a*) applies it to the goods themselves, or

(*b*) applies it to any covering, label, reel or other thing in or with which the goods are sold or are exposed or had in possession for sale or any purpose of trade or manufacture, or

(*c*) places, encloses or annexes any goods which are sold, or are exposed or had in possession for sale or any purpose of trade or manufacture, in, with or to any covering, label, reel or other thing to which a trade description has been applied, or

(*d*) uses a trade description in any manner reasonably calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade description.

(*2*) A trade description shall be deemed to be applied whether it is woven, impressed or otherwise worked into or annexed or affixed to the goods or any covering, label, reel or other thing.

(3) The expression "covering" includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame or wrapper, and the expression "label" includes any band or ticket.

NOTE.

The improper use of a trade-name may fall under this section and be punishable under s. 6 or s. 7 as a false trade description[1].

Penalty for applying a false trade description.

6. If a person applies a false trade description to goods, he shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be punished with imprisonment for a term which may extend to three months or with fine which may extend to two hundred rupees, and in case of a second or subsequent conviction with imprisonment which may extend to one year, or with fine, or with both.

Penalty for selling goods to which a false trade description is applied.

7. If a person sells, or exposes or has in possession for sale or any purpose of trade or manufacture, any goods or things to which a false trade description is applied, he shall, unless he proves—

(a) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade description, and

(b) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or

(c) that otherwise he had acted innocently, be punished with imprisonment for a term which may extend to three months, or with fine which may extend to two hundred rupees, and in case of a second or subsequent conviction with imprisonment which may extend to one year, or with fine, or with both.

Unintentional Contravention of the Law relating to Marks and Descriptions.

Unintentional contravention of the law relating to marks and descriptions.

8. Where a person is accused under section 482 of the Indian Penal Code of using a false trade mark or property mark by reason of his having applied a mark to any goods, property or receptacle in the manner mentioned in section 480 or section 481 of that Code, as the case may be, or under section 6 of this Act of applying to goods any false trade description, or under section 485 of the Indian Penal Code of making any die, plate or other instrument for the purpose of counterfeiting a trade mark or property mark, and proves—

(a) that in the ordinary course of business he is employed, on behalf of other persons, to apply trade marks or property marks, or trade descriptions,

[1] *Anath Nath Dey*, (1912) 40 Cal. 281.

or, as the case may be, to make dies, plates or other instruments for making, or being used in making, trade marks or property marks, and that in the case which is the subject of the charge he was so employed and was not interested in the goods or other thing by way of profit or commission dependent on the sale thereof, and

(*b*) that he took reasonable precautions against committing the offence charged, and

(*c*) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the mark or description, and

(*d*) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons on whose behalf the mark or description was applied,

he shall be acquitted.

Forfeiture of Goods.

Forfeiture of goods.

9. (*1*) When a person is convicted under section 482 of the Indian Penal Code of using a false trade mark, or under section 486 of that Code of selling, or exposing or having in possession for sale or any purpose of trade or manufacture, any goods or things with a counterfeit trade mark applied thereto, or under section 487 or section 488 of that Code of making, or making use of, a false mark, or under section 6 or section 7 of this Act of applying a false trade description to goods or of selling, or exposing or having in possession for sale or any purpose of trade or manufacture, any goods or things to which a false trade description is applied, or is acquitted on proof of the matter or matters specified in section 486 of the Indian Penal Code or section 7 or section 8 of this Act, the Court convicting or acquitting him may direct the forfeiture to Her Majesty of all goods and things, by means of, or in relation to, which the offence has been committed or, but for such proof as aforesaid, would have been committed.

(*2*) When a forfeiture is directed on a conviction, and an appeal lies against the conviction, an appeal shall lie against the forfeiture also.

(*3*) When a forfeiture is directed on an acquittal and the goods or things to which the direction relates are of value exceeding fifty rupees, an appeal against the forfeiture may be preferred, within thirty days from the date of the direction, to the Court to which in appealable cases appeals lie from sentences of the Court which directed the forfeiture.

Amendment of the Sea Customs Act, 1878.

Amendment of section 18, Act VIII of 1878.

10. (*1*) For clause (*d*) of section 18 of the Sea Customs Act, 1878, the following shall be substituted, namely :—

"(*d*) goods having applied thereto a counterfeit trade mark within the meaning of the Indian Penal Code, or a false trade description within the meaning of the Indian Merchandise Marks Act, 1889:

(e) goods made or produced beyond the limits of the United Kingdom and British India and having applied thereto any name or trade mark being, or purporting to be * * * the name or trade mark of any person who is a manufacturer, dealer or trader in the United Kingdom or in British India unless—

(i) the name or trade mark is, as to every application thereof, accompanied by a definite indication of the goods having been made or produced in a place beyond the limits of the United Kingdom and British India, and

(ii) the country in which that place is situated is in that indication indicated in letters as large and conspicuous as any letter in the name or trade mark, and the same language and character as the name or trade mark."

(2) To section 18 of the Sea Customs Act, 1878, as amended by sub-section (1), the following shall be added, namely :—

"(f) piece-goods, such as are ordinarily sold by length or by the piece, which—

(i) have not conspicuously stamped in English numerals on each piece the length thereof in standard yards, or in standard yards and a fraction of such a yard, according to the real length of the piece, and

(ii) have been manufactured beyond the limits of India, or

(iii) having been manufactured within those limits have been manufactured beyond the limits of British India in premises which, if they were in British India, would be a factory as defined in the Indian Factories Act, 1881."

Addition of a section after section 19, Act VIII of 1878

11. The following shall be added after s. 19 of the Sea Customs Act, 1878, namely :—

"19A. (1) Before detaining any such goods as are or may be specified in or under section 18 or section 19, as the case may be, or taking any further proceedings with a view to the confiscation thereof under this Act, the Chief Customs-officer or other officer appointed by the Local Government in this behalf may require the regulations under the section, whether as to information, security, conditions or other matters, to be complied with and may satisfy himself in accordance with those resolutions that the goods are such as are prohibited to be imported.

(2) The Governor General in Council may make regulations, either general or special, respecting the detention and confiscation of goods the importation of which is prohibited, and the conditions, if any, to be fulfilled before such detention and confiscation, and may by such regulations determine the information, notices and security to be given, and the evidence requisite for any of the purposes of this section and the mode of verification of such evidence.

(*3*) Where there is on any goods a name which is identical with, or a colourable imitation of, the name of a place in the United Kingdom or British India, that name, unless accompanied in equally large and conspicuous letters, and in the same language and character, by the name of the country in which such place is situate, shall be treated for the purposes of sections 18 and 19 as if it were the name of a place in the United Kingdom or British India.

(*4*) Such regulations may apply to all goods the importation of which is prohibited by section 18 or under section 19, or different regulations may be made respecting different classes of such goods or of offences in relation to such goods.

(*5*) The regulations may provide for the informant reimbursing any public officer and the Secretary of State for India in Council all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention.

(*6*) All regulations under this section shall be published in the Gazette of India and in the Calcutta, Fort St. George, Bombay and Burma Gazettes.

Stamping of Length of Piece-goods manufactured in British India.

Stamping of length of piece-goods manufactured in British India.

12. (*1*) Piece-goods, such as are ordinarily sold by length or by the piece, which have been manufactured in premises which are a factory as defined in the Indian Factories Act, 1881, shall not be removed from those premises without having conspicuously stamped in English numerals on each piece the length thereof in standard yards, or in standard yards and a fraction of such a yard, according to the real length of the piece.

(*2*) If any person removes or attempts to remove any such piece-goods from any such premises without the length of each piece being stamped in the manner mentioned in sub-section (*1*), every such piece, and everything used for the packing or removal thereof, shall be forfeited to Her Majesty, and such person shall be punished with fine which may extend to one thousand rupees.

Supplemental Provisions.

Evidence of origin of goods imported by sea.

13. In the case of goods brought into British India by sea, evidence of the port of shipment shall, in a prosecution for an offence against this Act or section 18 of the Sea Customs Act, 1878, as amended by this Act, be *prima facie* evidence of the place or country in which the goods were made or produced.

Costs of defence or prosecution.

14. (*1*) On any such prosecution as is mentioned in the last foregoing section or on any prosecution for an offence against any of the sections of the Indian Penal Code, as amended by this Act, which relate to trade, property and other marks, the Court may order costs to be paid to the defendant by the

prosecutor or to the prosecutor by the defendant, having regard to the information given by and the conduct of the defendant and prosecutor respectively.

(2) Such costs shall, on application to the Court, be recoverable as if they were a fine.

NOTE.

The Appellate Court can award the costs of appeal under this section.

Limitation of prosecution.

15. No such prosecution as is mentioned in the last foregoing section shall be commenced after the expiration of three years next after the commission of the offence, or one year after the first discovery thereof by the prosecutor, whichever expiration first happens.

Authority of the Governor General in Council to issue instructions as to administration of this Act.

16. (1) The Governor General in Council may, by notification in the Gazette of India and in local official Gazettes, issue instructions for observance by Criminal Courts in giving effect to any of the provisions of this Act.

(2) Instructions under sub-section (1) may provide, among other matters, for the limits of variation, as regards number, quantity, measure, gauge or weight, which are to be recognized by Criminal Courts as permissible in the case of any goods.

Implied warranty on sale of marked goods

17. On the sale or in the contract for the sale of any goods to which a trade mark or mark or trade description has been applied, the seller shall be deemed to warrant that the mark is a genuine mark and not counterfeit or falsely used, or that the trade description is not a false trade description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the seller and delivered at the time of the sale or contract to and accepted by the buyer.

Savings.

18. (1) Nothing in this Act shall exempt any person from any suit or other proceeding which might, but for anything in this Act, be brought against him

(2) Nothing in this Act shall entitle any person to refuse to make a complete discovery or to answer any question or interrogatory in any suit or other proceeding, but such discovery or answer shall not be admissible in evidence against such person in any such prosecution as is mentioned in s. 14.

(3) Nothing in this Act shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in British India who in good faith acts in obedience to the instructions of such master, and on demand made by or on behalf of the prosecutor, has given full information as to his master and as to the instructions which he has received from his master.

[1] *Ganpat Sitaram Mukadam*, (1914) 16 Bom. L. R. 78, 1 Bom. Cr C. 177.

Punishment of abetment in India of acts done out of India.

22. If any person, being within British India, abets the commission, without British India, of any act which, if committed in British India, would, under this Act, or under any section of that part of Chapter XVIII of the Indian Penal Code which relates to trade, property and other marks, be an offence, he may be tried for such abetment in any place in British India in which he may be found, and be punished therefor with the punishment to which he would be liable if he had himself committed in that place the act which he abetted.

THE INDIAN STATES (PROTECTION AGAINST DISAFFECTION) ACT.

(March 12, 1923.)

THE following Act which was made by the Governor-General under the provisions of section 67B of the Government of India Act and has received the assent of His Majesty signified by an order of His Majesty in Council is hereby published for general information :—

An Act to prevent the dissemination by means of books, newspapers and other documents of matter calculated to bring into hatred or contempt, or to excite disaffection against, Princes or Chiefs of States in India or the Government or Administrations established in such States.

Whereas it is expedient to prevent the dissemination by means of books- newspapers and other documents of matter calculated to bring into hatred or contempt, or to excite disaffection against, Princes or Chief of States in India or the Government or Administrations established in such States; It is hereby enacted as follows :—

Short title and extent.

1. *(1)* This Act may be called the Indian States (Protection against Disaffection) Act, 1922.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "book" and "newspaper" have the meanings respectively assigned to them by the Press and Registration of Books Act, 1867;

(b) "disaffection" includes disloyalty and all feelings of enmity; and

(c) "document" includes any painting, drawing, photograph, or other visible representation.

Penalty.

3. *(1)* Whoever edits, prints or publishes, or is the author of, any book, newspaper or other document which brings or is intended to bring into hatred or contempt, or excites or is intended to excite disaffection towards, any Prince or Chief of a State in India or the Government or Administration established in any such State, shall be punishable with imprisonment which may extend to five years, or with fine, or with both.

(2) No person shall be deemed to commit an offence under this section in respect of any book, newspaper or other document which, without exciting or being intended to excite hatred, contempt or disaffection, contains comments expressing disapprobation of the measures of any such Prince, Chief, Government or Administration as aforesaid with a view to obtain their alteration by lawful means, or disapprobation of the administrative or other action of any such Prince, Chief, Government or Administration.

NOTE.

A person who is accused under this section is entitled to adduce evidence to prove that the allegations made by him are true inasmuch as he has a right to plead extenuating circumstances such as a worthy motive in mitigation of the penalty which may be imposed on him in the event of his conviction and for making good such a plea it may be necessary for him to show that the allegations are true[1].

Power to forfeit certain publications or to detain them in course of transmission through post.

4. The provisions of sections 99A to 99G of the Code of Criminal Procedure, 1898, and of sections 27B to 27D of the Indian Post Office Act, 1898, shall apply in the case of any book, newspaper or other document containing matter in respect of which any person is punishable under section 3 in like manner as they apply in the case of a book, newspaper or document containing seditious matter within the meaning of those sections

Courts by which and conditions subject to which offence may be tried.

5. No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall proceed to the trial of any offence under section 3, and no Court shal proceed to the trial of any such offence except on complaint made by, or under authority from, the Governor-General in Council.

[1] *Santa Singh*, (1927) 29 Cr. L J. 117.

3. Provided always that nothing herein contained shall interfere with or affect the authority or discretion of any Court in respect of any punishment which such Court may now award or pass on any offender other than transportation; but, where such other punishment may be awarded at the discretion of the Court instead of transportation or in addition thereto, the same may be awarded instead of, or (as the case may be) in addition to, the punishment substituted for transportation by this Act.

Discretion of Courts as to alternative punishments.

4 If any offender sentenced by any Court within the said territories to the punishment of death shall have mercy extended to him, upon condition of his being kept in penal servitude for life, or for any term of years, all the provisions of this Act shall be applicable to such offender in the same manner as if he had been lawfully sentenced under this Act to the term of penal servitude specified in the condition.

Effect of pardon granted upon condition of penal servitude.

5. *[Power to substitute penal servitude for transportation.] Rep. by the Prisoners Act, 1871 (V of 1871).*

6. *[Mode of dealing with person under sentence of penal servitude.] Rep. by the Prisoners Act, 1871 (V of 1871).*

7. *[Application of enactments respecting transportation and imprisonment with hard labour.] Rep. by the Prisoners Act, 1871 (V of 1871).*

8. *Repealed by Act X of 1914, Sch. II.*

9, 10, 11 and 12. *[Licenses to convicts under sentence of penal servitude to be at large.] Rep. by the Prisoners Act, 1871 (V of 1871).*

13. Nothing in this Act is intended to alter or affect the provisions of the 12 and 13 Victoria, Chapter 43, or any Act of Parliament passed in the United kingdom of Great Britain and Ireland since the 28th of August, 1833, or which may hereafter be passed.

Act not to affect the provisions of certain English statutes.

14. Any sentence or order upon any person describing him as a European or American shall be deemed, for the purposes of this Act, to be conclusive of the fact that such person is a European or American within the meaning of this Act.

Sentence when proof that a person is a European or an American.

15. The word "European", as used in this Act, shall be understood to include any person usually designated a European British subject.

Interpretation clause.

16. *[Commencement of Act]. Rep. by the Repealing Act, 1870 (XIV of 1870.)*

[1] The rest of the section is repealed by Act X of 1914, Sch II

THE POLICE (INCITEMENT TO DISAFFECTION) ACT.

(ACT No. XXII OF 1922.)

AN ACT to provide a penalty for spreading disaffection among the police and for kindred offences.

WHEREAS it is expedient to penalize the spreading of disaffection among the police and other kindred offences; It is hereby enacted as follows :—

Short title, extent and commencement.

1. (1) This Act may be called the Police (Incitement to Disaffection) Act, 1922.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force in any province or part of a province on such date as the Local Government may, by notification in the local official Gazette, direct.

Definition.

2. In this Act, the expression "member of a police-force" means any person appointed or enrolled for the performance of police duties under any enactment specified in the Schedule.

Penalty for causing disaffection, etc.

3. Whoever intentionally causes or attempts to cause, or does any act which he knows is likely to cause, disaffection towards His Majesty or the Government established by law in British India amongst the members of a police-force, or induces or attempts to induce, or does any act which he knows is likely to induce, any member of a police-force to withhold his services or to commit a breach of discipline shall be punished with imprisonment which may extend to six months or with fine which may extend to two hundred rupees, or with both.

Explanation.—Expressions of disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, or of disapprobation of the administrative or other action of the Government, do not constitute an offence under this section unless they cause or are made for the purpose of causing or are likely to cause disaffection.

Saving of acts done by police associations and other persons for certain purposes.

4. Nothing shall be deemed to be an offence under this Act which is done in good faith—

(a) for the purpose of promoting the welfare or interests of any member of a police-force by inducing him to withhold his services in any manner authorised by law; or

(b) by or on behalf of any association formed for the purpose of furthering the interests of members of a police-force as such, where the association has been authorized or recognized by the Government and the act done

is done under any rules or articles of the association which have been approved by the Government.

Sanction to trial of offences by subordinate Courts.

5. No Court shall proceed to the trial of any offence under this Act except with the previous sanction, or on the complaint, of the District Magistrate or, in the case of a Presidency town or the town of Rangoon, of the Commissioner of Police.

Trial of cases.

6 (1) No Court inferior to that of a Presidency Magistrate or Magistrate of the first class shall try any offence under this Act.

(2) Notwithstanding anything contained in Chapter XXII of the Code of Criminal Procedure, 1898, no offence under this Act shall be triable summarily.

THE SCHEDULE.

(See Section 2.)

Year.	No.	Short title
		Acts of the Governor General in Council
1859	XXIV	The Madras District Police Act, 1859
1861	V	The Police Act, 1861.
1887	XV	The Burma Military Police Act, 1887.
1888	III	The Police Act, 1888.
1892	V	The Bengal Military Police Act, 1892
		Madras Act
1888	III	The Madras City Police Act, 1888.
		Bombay Acts.
1890	IV	The Bombay District Police Act, 1890
1902	IV	The City of Bombay Police Act, 1902.
		Bengal Acts.
1866	II	The Calcutta Suburban Police Act, 1866.
1866	IV	The Calcutta Police Act, 1866.
1890	III	The Calcutta Port Act, 1890.
1920	II	The Eastern Frontier Rifles (Bengal Battalion) Act 1920.
		Burma Act.
1899	IV	The Rangoon Police Act, 1899.
		Assam Act.
1920	I	The Assam Rifles Act, 1920.
		Regulation by the Governor General in Council
1888	II	The Andaman and Nicobar Islands Military Police Regulation 1888.

THE PREVENTION OF SEDITIOUS MEETINGS ACT.

(Act No. X of 1911.)

An Act to consolidate and amend the law relating to the prevention of public meetings likely to promote sedition or to cause a disturbance of public tranquillity.

Whereas it is expedient to consolidate and amend the law relating to the prevention of public meetings likely to promote sedition or to cause a disturbance of public tranquillity; It is hereby enacted as follows:—

Short title and extent.

1. (*1*) This Act may be called the Prevention of Seditious Meetings Act, 1911.

(*2*) It extends to the whole of British India, but shall have operation only in such Provinces or parts of Provinces as the Governor-General in Council may from time to time notify in the Gazette of India.

Power of Local Government to notify proclaimed areas.

2. (*1*) The Local Government may, with the previous sanction of the Governor-General in Council, by notification in the local official Gazette, declare the whole or any part of a Province, in which this Act is for the time being in operation, to be a proclaimed area.

(*2*) A notification made under sub-section (*1*) shall not remain in force for more than six months, but nothing in this sub-section shall be deemed to prevent the Local Government, with the previous sanction of the Governor-General in Council, from making any further notifications in respect of the same area from time to time as it may think fit.

Definition.

3. (*1*) In this Act, the expression "public meeting" means a meeting which is open to the public or any class or portion of the public.

(*2*) A meeting may be a public meeting notwithstanding that it is held in a private place and notwithstanding that admission thereto may have been restricted by ticket or otherwise.

Notice to be given of public meetings.

4. (*1*) No public meeting for the furtherance or discussion of any subject likely to cause disturbance or public excitement, or for the exhibition or distribution of any writing or printed matter relating to any such subject, shall be held in any proclaimed area—

(*a*) unless written notice of the intention to hold such meeting and of the time and place of such meeting has been given to the District Magistrate or the Commissioner of Police, as the case may be, at least three days previously; or

(b) unless permission to hold such meeting has been obtained in writing from the District Magistrate or the Commissioner of Police, as the case may be.

Power of Magistrate to cause report to be taken.

(2) The District Magistrate or any Magistrate of the first class authorized by the District Magistrate in this behalf may, by order in writing, depute one or more Police-officers, not being below the rank of a Head Constable, or other persons, to attend any such meeting for the purpose of causing a report to be taken of the proceedings.

Exception.

(3) Nothing in this section shall apply to any public meeting held under any statutory or other express legal authority, or to public meetings convened by a Sheriff, or to any public meetings or class of public meetings exempted for that purpose by the Local Government by general or special order.

Power to prohibit public meetings

5. The District Magistrate or the Commissioner of Police, as the case may be, may at any time, by order in writing, of which public notice shall forthwith be given, prohibit any public meeting in a proclaimed area if, in his opinion, such meeting is likely to promote sedition or disaffection or to cause a disturbance of the public tranquillity.

Penalties.

6 (1) Any person concerned in the promotion or conduct of a public meeting held in a proclaimed area contrary to the provisions of section 4 shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both.

(2) Any public meeting which has been prohibited under section 5 shall be deemed to be an unlawful assembly within the meaning of Chapter VIII of the Indian Penal Code and of Chapter IX of the Code of Criminal Procedure, 1898.

Penalty for delivery of speeches in public places.

7. Whoever, in a proclaimed area, in a public place or a place of public resort, otherwise than at a public meeting held in accordance with, or exempted from, the provisions of section 4, without the permission in writing of the Magistrate of the District or of the Commissioner of Police, as the case may be, previously obtained, delivers any lecture, address or speech on any subject likely to cause disturbance or public excitement to persons then present, may be arrested without warrant, and shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both.

Cognizance of offences

8. No Court inferior to that of a Presidency Magistrate or of a Magistrate of the first class or Sub-divisional Magistrate shall try any offence against this Act.

9 [*Repealed by Act XII of 1927*).

THE REFORMATORY SCHOOLS ACT.

(ACT NO. VIII OF 1897).

AN ACT to amend the law relating to Reformatory Schools and to make further provision for dealing with youthful offenders.

Preamble.

WHEREAS it is expedient to amend the law relating to Reformatory Schools and to make further provisions for dealing with youthful offenders; It is hereby enacted as follows:—

I. *Preliminary.*

Title, commencement and extent.

1. (*1*) This Act may be called the Reformatory Schools Act, 1897;

(*2*) [*Repealed by Act X of 1914, Sch. II.*]

(*3*) This section and s. 2 shall extend to the whole of British India. The other sections shall extend in the first instance to the whole of British India except the territories for the time being administered by the Lieutenant-Governor of the Punjab and the Chief Commissioner of Coorg, but either of the aid Local Governments may at any time, by notification in the local official Jazette, extend these sections to their territories from such day as may be ixed in any such notification.

Repeal of Act.

2. (*1*) The Reformatory Schools Act, 1876, is hereby repealed.

(*2*) But all proceedings taken, orders passed, officers appointed or uthorized and rules made under the said Act shall, as far as may be, be deemed o have been respectively passed, appointed or authorized and made under this Act.

(*3*) Any enactment or document referring to the said Act shall, as ar as may be, be construed to refer to this Act, or to the corresponding portions hereof.

Section 399 of Act X of 1882 repealed on date xed by a notification under section , sub-section (3).

3. From the date fixed by any notification issued under section 1, sub-section (*3*), section 399 of the Code of Criminal Procedure, 1882, shall be repealed in the province to which the notification relates.

4. In this Act, unless there is anything repugnant in the subject or context,—

Definitions.

(*a*) "Youthful offender" means any boy who has been convicted of any offence punishable with transportation or imprisonment and who, at the time of such conviction, was under the age of fifteen[1] years:

[1] In the Presidency of Bombay read "sixteen." See Bom. Act No. XIII of 1924, ss. 3 (c), 4.

(*b*) "Inspector-General" includes any officer appointed by the Local Government to perform all or any of the duties imposed by this Act on the Inspector-General: and

(*c*) "District Magistrate" shall include a Chief Presidency Magistrate.

II.—Reformatory Schools.

Power to establish and discontinue Reformatory Schools.

5. *** the Local Government may

(*a*) establish and maintain Reformatory Schools at such places as it may think fit;

(*b*) use as Reformatory Schools kept by persons willing to act in conformity with such rules, consistent with this Act, as the Local Government may prescribe in this behalf;

(*c*) direct that any school so established or used shall cease to exist as a Reformatory School or to be used as such.

Requisites of schools.

6. Every school so established or used must provide—

(*a*) sufficient means of separating the inmates at night;

(*b*) proper sanitary arrangements, water-supply, food, clothing and bedding for the youthful offenders detained therein,

(*c*) the means of giving such youthful offenders industrial training,

(*d*) an infirmary or proper place for the reception of such youthful offenders when sick.

Inspection of Reformatory.

7. (*1*) Every school intended to be established or used as a Reformatory School shall, before being used as such, be inspected by the Inspector-General, and if he finds that the requirements of section 6 have been complied with, and that, in his opinion, such school is fitted for the reception of such youthful offenders as may be sent there under this Act, he shall certify to that effect and such certificate shall be published in the local official Gazette, together with an order of the Local Government establishing the school as a Reformatory School or directing that it shall be used as such, and the school shall thereupon be deemed to be a Reformatory School.

(*2*) Every such school shall, from time to time, and at least once in every year, be visited by the said Inspector-General, who shall send to the Local Government a report on the condition of the school in such form as the Local Government may prescribe.

Power of Courts to direct youthful offenders to be sent to Reformatory Schools.

8. (*1*) Whenever any youthful offender is sentenced to transportation or imprisonment, and is, in the judgment of the Court by which he is sentenced, a proper person to be an inmate of a Reformatory School, the Court may, subject to any rules made by the Local Government, direct that, instead of

undergoing his sentence, he shall be sent to such a school, and be there detained for a period which shall be not less than three or more than seven years.

(2) The powers so conferred on the Court by this section shall be exercised only by (a) the High Court, (b) a Court of Session, (c) a District Magistrate, and (d) any Magistrate specially empowered by the Local Government in this behalf, and may be exercised by such Courts whether the case comes before them originally or on appeal.

(3) The Local Government may make rules for—

(a) defining what youthful offenders should be sent to Reformatory Schools, having regard to the nature of their offences or other considerations, and

(b) regulating the periods for which youthful offenders may be sent to such schools according to their ages or other considerations.

Procedure where Magistrate is not empowered to pass an order under section 8.

9. (1) When any Magistrate not empowered to pass an order under the last foregoing section is of opinion that a youthful offender convicted by him is a proper person to be an inmate of a Reformatory School, he may, without passing sentence, record such opinion and submit his proceedings and forward the youthful offender to the District Magistrate to whom he is subordinate.

(2) The Magistrate to whom the proceedings are so submitted may make such further inquiry (if any) as he may think fit and pass such sentence and order for the detention in a Reformatory School of the youthful offender, or otherwise, as he might have passed if such youthful offender has been originally tried by him.

Power of Magistrates to direct boys under fifteen sentenced to imprisonment to be sent to Reformatory schools.

10. The officer in charge of a prison in which a youthful offender is confined, in execution of a sentence of imprisonment, may bring him, if he has not then attained the age of fifteen years before the District Magistrate within whose jurisdiction such prison is situate; and such Magistrate may, if such youthful offender appears to be a proper person to be an inmate of a Reformatory School, direct that, instead of undergoing the residue of his sentence, he shall be sent to a Reformatory School and there detained for a period which shall be subject to the same limitations as are prescribed by or under s. 8, with reference to the period of detention thereby authorized.

Preliminary inquiry and finding as to age of youthful offender.

11. (1) Before directing any youthful offender to be sent to a Reformatory School under section 8, section 9, or section 10, the Court or Magistrate shall inquire into the question of his age and, after taking such evidence (if any) as may be deemed necessary, shall record a finding thereon, stating his age as nearly as may be.

(2) A similar inquiry shall be made and finding recorded by every Magistrate not empowered to pass an order under section 8 before submitting

his proceedings and forwarding the youthful offender to the District Magistrate as required by section 9, sub-section (1).

Government to determine Reformatory School to which such offenders shall be sent.

12. Every youthful offender directed by a Court or Magistrate to be sent to a Reformatory School shall be sent to such Reformatory School as the Local Government may, by general or special order, appoint for the reception of youthful offenders so dealt with by such Court of Magistrate:

Provided that, if accommodation in a Reformatory School is not immediately available for such youthful offender, he may be detained in the juvenile ward or such other suitable part of a prison as the Local Government may direct—

(a) until he can be sent to a Reformatory School, or

(b) until the term of his original sentence expires,

whichever event may first happen Should the term of his original sentence first expire, he shall thereupon be released, but should he be sent to a Reformatory School, then the period of detention previously undergone shall be treated as detention in a Reformatory School.

Persons found to be over eighteen years not to be detained in Reformatory Schools.

13. (1) If at any time after a youthful offender has been sent to a Reformatory School it appears to the Committee of Visitors or Board of Management, as the case may be, that the age of such youthful offender has been understated in the order for detention, and that he will attain the age of eighteen years before the expiration of the period for which he has been ordered to be detained, they shall report the case for the orders of the Local Government.

(2) No person shall be detained in a Reformatory School after he has been found by the Local Government to have attained the age of eighteen years.

Discharge or removal by order of Government.

14. The Local Government may at any time order any youthful offender—

(a) to be discharged from Reformatory School,

(b) to be removed from one Reformatory School to another such school situate within the territories subject to such Government: Provided that the whole period of his detention in a Reformatory School shall not be increased by such removal

Power to Governor General in Council to direct use of Reformatories in one province for reception of youthful offenders from another.

15 (1) The Governor-General in Council may by general or special order direct that any Reformatory School situated in one province shall be available for the reception of youthful offenders directed to be sent to any Reformatory School by any Court or Magistrate in any other province.

(2) Any such order may also provide for the removal of the youthful offender, and the cost of his maintenance, and may give any such further directions as may be necessary.

16. Nothing contained in the Code of Criminal Procedure, 1882, shall be construed to authorize any Court or Magistrate to alter or reverse in appeal or revision any order passed with respect to the age of a youthful offender or the substitution of an order for detention in a Reformatory School for transportation or imprisonment.

Certain orders not subject to appeal or revision.

III.—*Management of Reformatory Schools.*

17. (*1*) For the control and management of every Reformatory School, the Local Government shall appoint either (*a*) a Superintendent and a Committee of Visitors, or (*b*) a Board of Management.

Appointment of Superintendent and Committee of Visitors or Board of Management.

(*2*) Every Committee and every Board so appointed must consist of not less than five persons, of whom two at least shall be natives of India.

(*3*) The Local Government may suspend or remove any Superintendent or any Member of a Committe or Board so appointed.

18. (*1*) Every Superintendent so appointed may, with the sanction of the Committee, by license under his hand, permit any youthful offender sent to a Reformatory School, who has attained the age of fourteen years, to live under the charge of any trustworthy and respectable person named in the license, or any officer of Government or of a Municipality, being an employer of labour and willing to receive and take charge of him, on the condition that the employer shall keep such youthful offender employed at some trade, occupation or calling.

Superintendent may license youthful offenders to employers of labour.

(*2*) The license shall be in force for three months and no longer, but may, at any time and from time to time until the expiration of the period for which the youthful offender has been directed to be detained, be renewed for three months at a time.

19. The license shall be cancelled at the desire of the employer named in the license.

Cancellation of license.

20. If during the term of the license the employer named therein dies, or ceases from business or to employ labour, or the period for which the youthful offender has been directed to be detained in the Reformatory School expires, the license shall thereupon cease and determine.

Determination of license.

21. If it appears to the Superintendent that the employer has ill-treated the youthful offender, or has not adequately provided for his lodging and maintenance, the Superintendent may cancel the license.

Cancellation of license in case of ill-treatment.

Superintendent to be deemed guardian of youthful offenders.

22. (*1*) The Superintendent of a Reformatory School shall be deemed to be the guardian of every youthful offender detained in such school, within the meaning of Act No. XIX of 1850 (*concerning the binding of apprentices*).

Power to apprentice youthful offender.

(*2*) If it appears to the Superintendent that any youthful offender licensed under section 18 has behaved well during one or more periods of his license, the Superintendent may, with the sanction of the Committee, apprentice him under the provisions of the said Act, and on such apprenticement the right to detain such youthful offender in a Reformatory School shall cease, and the unexpired term (if any) of his sentence shall be cancelled.

Duties of Committee of Visitors.

23. (*1*) Every Committee of Visitors appointed under section 17 for a Reformatory School shall, at least once in every month,—

(*a*) visit the school, to hear complaints, and see that the requirements of s. 6 *have been complied with, and that the management of the school* is proper in all respects;

(*b*) examine the punishment-book;

(*c*) bring any special cases to the notice of the Inspector-General;

(*d*) see that no person is illegally detained in the school.

(*2*) If any member of a Committee of Visitors so appointed fails or neglects, during a period of six consecutive months, to visit the school and assist in the discharge of the duties aforesaid, he shall cease to be a member of such Committee.

Powers of Board of Management.

24. If, in exercise of the power conferred by section 17, the Local Government appoints a Board of Management for any Reformatory School, such Board shall have the powers and perform the functions of the Superintendent under sections 18 to 22, both inclusive; and the license mentioned in section 18 may be under the hand of their Chairman; and they shall be deemed to be the guardians of the youthful offenders detained in such school.

Power to appoint Trustees or other Managers of a school to be a Board of Management

25. The Local Government may declare any body or Trustees or Managers of a school, who are willing to act in conformity with the rules referred to in section 5, clause (*b*), to be a Board of Management under this Act, and thereupon such body or Managers shall have all the powers and perform all the functions of such Board of Management.

Power of Board to make rules.

26. (*1*) With the previous sanction of the Local Government, every Board of Management of a Reformatory School may *from* time to time make rules consistent with this Act—

(*i*) to prescribe the articles which are to be deemed to be "*prohibited* articles"; and

(*ii*) to regulate—

(*a*) the conduct of business of the Board;

(*b*) the management of the school;

(*c*) the education and industrial training of youthful offenders;

(*d*) visits to, and communication with, youthful offenders;

(*e*) the terms and conditions under which any articles declared by the Board to be "prohibited articles" may be introduced into or removed out of the school;

(*f*) the manner in which such articles are to be removed when introduced without due authority;

(*g*) the conditions and limitations under which such articles may be supplied outside the school to any youthful offender under order of detention therein;

(*h*) the conditions on which the possession by any such youthful offender of such articles may be sanctioned;

(*i*) the penalties to be imposed for the supply or possession of such articles when supplied or possessed without due authority;

(*j*) the punishment of offences committed by youthful offenders; and

(*k*) the granting of licenses for the employment of youthful offenders.

(*2*) In the absence of a Board of Management the Local Government may make rules consistent with this Act to regulate for any Reformatory School the matters mentioned in any clause of sub-section (*1*), other than clause (*ii*) (*a*), and also the mode in which the Committee of Visitors shall conduct their business.

IV.—Offences in relation to Reformatory Schools.

Penalty for introduction or removal or supply of prohibited articles and communication with youthful offenders.

27. Whoever, contrary to any rule made under s. 26, introduces or removes or attempts by any means whatever to introduce or remove into or from any Reformatory School, or supplies or attempts to supply outside the limits of any Reformatory School, to any youthful offender under order of detention therein, any prohibited article,—and every officer or person in charge of a Reformatory School who, contrary to any such rule, knowingly suffers any such article to be introduced into or removed from any Reformatory School, to be possessed by any youthful offender detained therein, or to be supplied to any such youthful offender outside its limits,

and whoever, contrary to any such rule, communicates or attempts to communicate with any such youthful offender,

and whoever abets any offender made punishable under this section,

shall, on conviction before a Magistrate, be liable to imprisonment for a term not exceeding six months, or to fine not exceeding two hundred rupees, or to both.

Penalty for abetting escape of youthful offender.

28. Whoever abets an escape, or an attempt to escape, on the part of a youthful offender from a Reformatory School, or from the employer of such youthful offender, shall be punishable with imprisonment for a term which may extend to six months, or with fine not exceeding two hundred rupees, or with both.

Arrest of escaped youthful offender.

29. A Police-officer may, without orders from a Magistrate and without a warrant, arrest any youthful offender sent to a Reformatory School under this Act, who has escaped from such school or from his employer, and take him back to such school or to his employer.

V.—*Miscellaneous.*

30. [*Repealed by Act III of 1908, Schedule III.*]

Power to deal in other ways with youthful offenders, including girls.

31. (*1*) Notwithstanding anything contained in this Act or in any other enactment for the time being in force, any Court may, if it shall think fit, instead of sentencing any youthful offender to transportation or imprisonment or directing him to be detained in a Reformatory School, order him to be—

(*a*) discharged after due admonition, or

(*b*) delivered to his parent, or to his guardian or nearest adult relative, or such parent, guardian or relative executing a bond, with or without sureties, as the Court may require, to be responsible for the good behaviour of the youthful offender for any period not exceeding twelve months

(*2*) For the purposes of this section the term "youthful offender" shall include a girl.

(*3*) The *powers conferred on the Court by this section* shall be exercised only by Courts empowered by or under section 8.

(*4*) When any youthful offender is convicted by a Court not empowered to act under this section and the Court is of opinion that the powers conferred by this section should be exercised in respect of such youthful offender, it may record such opinion and submit the proceedings and forward the youthful offender to the District Magistrate to whom such Court is subordinate.

(*5*) The District Magistrate to whom the proceedings are so submitted may thereupon make such order or pass such sentence as he might have made or passed if the case had originally been tried by him.

Procedure when youthful offender under detention in a Reformatory School is again convicted and sentenced

32. When a youthful offender during his period of detention in a Reformatory School is again convicted by a Criminal Court the sentence of such Court shall commence at once notwithstanding anything to the contrary in s. 397 of the Code of Criminal Procedure, 1882, but the Court shall forthwith report the matter to the Local Government, which shall have power to deal with the matter in any way in which it [illegible]

THE SLAVE TRADE ACT.

(39 & 40 Vic., c. 46.)

An Act for more effectually punishing Offences against the Laws relating to the Slave Trade.

Whereas under an act passed in the Session holden in the thirty-second and thirty-third years of the reign of Her present Majesty, the Governor General of India in Council is empowered to make laws for Native Indian subjects of Her Majesty without and beyond British India:

And whereas under an Act passed in the Session holden in the twenty-eighth and twenty-ninth years of the reign of Her present Majesty, the Governor General of India in Council is empowered to make laws for all British subjects of Her Majesty within the dominions of Princes and States in India in alliance with Her Majesty whether in the service of the Government of India or otherwise:

And whereas the several Princes and States in India in alliance with Her Majesty have no connexions, engagements, or communications with Foreign Powers, and the subjects of such Princes and States are, when residing or being in the places herein-after referred to, entitled to the protection of the British Government, and receive such protection equally with the subjects of Her Majesty:

And whereas it is expedient to make provision for more effectually punishing offences against the laws relating to the slave trade by British subjects and other persons protected by the British Government in such places:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Certain offenders on High Seas punished as though offence committed in India.

1. If any person, being a subject of Her Majesty or of any Prince or State in India in alliance with Her Majesty, shall, upon the High Seas or in any part of Asia or Africa which Her Majesty may from time to time think fit to specify by any Order in Council in this behalf, commit any of the offences defined in ss. 367, 370 and 371, (in the schedule to this Act respectively recited) of Act XLV of 1860, passed by the Governor-General of India in Council and called "The Indian Penal Code," or abet within the meaning of the fifth chapter of the said Penal Code the commission of any such offence, such person shall be dealt with, in respect of such offence or abetment, as if the same had been committed in any place within British India in which he may be or may be found.

2. If the Governor-General of India in Council shall, at a meeting for making laws and regulations, amend the provisions of the said sections 367, 370, and 371 of the said Penal Code, or any of them, or the said fifth chapter thereof so far as relates to the abetment of any of the offences forbidden by such sections, or make any further provisions for preventing or suppressing the making, buying or selling of slaves or any of the offences comprised in the said three sections, the Secretary of State for India shall, unless Her Majesty has disallowed such amendment or further provision, lay a copy of the amending Act before each House of Parliament, and after the same shall have lain on the table of both Houses of Parliament for the space of forty days, it shall be lawful for Her Majesty, unless either House of Parliament shall present an address to Her Majesty to the contrary, to direct by Order in Council that the provisions of the first section of this Act shall apply to the law so amended or enlarged, and the same shall be applicable accordingly.

Sect. 1 may be made to apply to future amendments of this Act.

3. For the purpose of obtaining evidence of the commission of the offences made punishable by this Act or any Act or Parliament relating to slavery or the slave trade, every High Court in India shall have, as respects the persons in the first section of this Act referred to, and as respects any British colony, settlement, plantation, or territory, wherein any witness may be, the same powers as are conferred on the Court of Queen's Bench by the fourth section of an Act made and passed in the Session of Parliament holden in the sixth and seventh years of Her Majesty's reign, chapter ninety-eight, with respect to such British Colonies, settlements, plantations, and territories as are therein referred to.

Powers of High Court for purpose of obtaining evidence.

And every High Court may, if it thinks fit, issue such commission as is mentioned in section 330 of Act X of 1872, passed by the Governor-General of India in Council, and called, "The Code of Criminal Procedure", to any Consular Officer of Her Majesty in the parts of Asia or Africa specified in any order of Her Majesty in Council under section 1 of this Act, or to any Political officer or agent of the Governor-General of India in Council or of any Indian Government in the said parts or in the dominions of any Prince or State in India in alliance with Her Majesty, or to any magistrate in Her Majesty's Indian dominions.

And the depositions taken by virtue of the said powers or under such commission shall be deemed by every court of original or appellate jurisdiction in India in any trial or proceeding under this Act or any Act of Parliament relating to slavery or the slave trade to be as good and competent evidence as if the witnesses deposing had been present and examined viva voce and had made oath or affirmation as required by law.

Subjects of certain Indian Princes made amenable to certain Orders in Council.

4. And whereas by certain Orders of Her Majesty in Council made by virtue of an Act made and passed in the Session of Parliament holden in the sixth and seventh years of Her Majesty's reign, chapter ninety-four, which Orders are dated respectively the ninth August one thousand eight hundred and sixty-six and the fourth November one thousand eight hundred and sixty-seven, it is ordered that the provisions of such Orders relating to British subjects shall extend and apply to all subjects of Her Majesty, whether by birth or by naturalisation, and also to all persons enjoying Her Majesty's protection in the several dominions mentioned in such Orders respectively:

It is hereby declared and enacted that for the purposes of the said Orders in Council, and of any Orders in Council which Her Majesty may hereafter think fit to make by virtue of the said Act of the sixth and seventh years of Her Majesty's reign, chapter ninety-four, all subjects of the several Princes and States in India in alliance with Her Majesty, residing and being in the several dominions comprised in such Orders respectively, are and shall be deemed to be persons enjoying Her Majesty's protection therein.

NOTE.

By an Order in Council, dated April 30, 1877[1], this statute is extended to the following parts of Asia and Africa:—

(a) The territories of the Khan of Khelat and of the Sultan of Muscat in Mekran and Arabia.

(b) The coasts of Baluchistan and of the Bunder Abbas Districts and the shores of the Persian Gulf.

(c) The coasts of Arabia from Ras Mussendom to Cape Bal-el-Mandeb.

(d) The territories of the following tribes near Aden, viz:—

The Abdali	The Howshabi	The Subahi
The Foodli	The Alawi	The Gafai
The Akrabi	The Amir	The Oulaki

(e) The Coast of Africa from Ras Sejarme to Delagoa Bay.

(f) The territories of the Sultan of Zanzibar.

(g) The sea and islands within ten degrees of latitude and longitude from such coast and shores respectively.

By the Slave Trade Offences (India) Order in Council, dated 14th October 1913, this Act is made applicable to the territories of the Kaiti, Wahidi, Behan, Audali and Eeda tribes near Aden, and to the territories of the Mahri tribe of Kishin and Socotra[2].

Saving powers of Governor General.

5. Nothing in this Act shall be deemed to restrict the legislative power which the Governor General of India in Council possesses at meetings for the purposes of making laws and regulations.

Not to affect Orders made under 6 and 7 Vict. c. 94.

6. Save as aforesaid, nothing in this Act shall be deemed to affect any Order made or to be made by Her Majesty in Council by virtue of the said Act of the sixth and seventh years of Her Majesty, chapter ninety-four.

1 Published in the *London Gazette*, No. 24466, p. 3447, on June 1, 1877.

2 Gazette of India, 1913, Part I, p. 1113.

THE TERRITORIAL WATERS JURISDICTION ACT, 1878.

(41 & 42 Vic., c. 73).

An Act to regulate the Law relating to the Trial of Offences committed on the Sea within a certain distance of the Coasts of Her Majesty's Dominions.

Whereas the rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions:

And whereas it is expedient that all offences committed on the open sea within a certain distance of the coasts of the United Kingdom and of all other parts of Her Majesty's dominions, by whomsoever committed, should be dealt with according to law:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited as the Territorial Waters Jurisdiction Act, 1878.

Amendment of the law as to the jurisdiction of the Admiral.

2. An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly.

Restriction on institution of proceedings for punishment of offence.

3 Proceedings for the trial and punishment of a person who is not a subject of Her Majesty, and who is charged with any such offence as is declared by this Act to be within the jurisdiction of the Admiral, shall not be instituted in any court of the United Kingdom, except with the consent of one of Her Majesty's Principal Secretaries of State, and on his certificate that the institution of such proceedings is in his opinion expedient, and shall not be instituted in any of the dominions of Her Majesty out of the United Kingdom, except with the leave of the Governor of the part of the dominions in which such proceedings are proposed to be instituted, and on his certificate that it is expedient that such proceedings should be instituted.

4. On the trial of any person who is not a subject of Her Majesty for an offence declared by this Act to be within the jurisdiction of the Admiral, it shall not be necessary to aver in any indictment or information on such trial that such consent or certificate of the Secretary of State or Governor as is required by this Act has been given, and the fact of the same having been given shall be presumed unless disputed by the defendant at the trial; and the production of a document purporting to be signed by one of Her Majesty's Principal Secretaries of State as respects the United Kingdom, and by the Governor as respects any other part of Her Majesty's dominions, and containing such consent and certificate, shall be sufficient evidence for all the purposes of this Act of the consent and certificate required by this Act.

Provisions as to procedure.

Proceedings before a justice of the peace or other magistrate, previous to the committal of an offender for trial or to the determination of the justice or magistrate that the offender is to be put upon his trial shall not be deemed proceedings for the trial of the offence committed by such offender for the purposes of the said consent and certificate under this Act.

5. Nothing in this Act contained shall be construed to be in derogation of any rightful jurisdiction of Her Majesty, her heirs or successors, under the law of nations, or to affect or prejudice any jurisdiction conferred by Act of Parliament or now by law existing in relation to foreign ships or in relation to persons on board such ships.

Saving as to jurisdiction.

6. This Act shall not prejudice or affect the trial in manner heretofore in use of any act of piracy as defined by the law of nations, or affect or prejudice any law relating thereto; and where any act of piracy as defined by the law of nations is also any such offence as is declared by this Act to be within the jurisdiction of the Admiral, such offence may be tried in pursuance of this Act, or in pursuance of any other Act of Parliament, law, or custom relating thereto.

Saving as to piracy.

7. In this Act, unless there is something inconsistent in the context, the following expressions shall respectively have the meanings herein-after assigned to them; that is to say,

Definitions.

"The jurisdiction of the Admiral," as used in this Act, includes the jurisdiction of the Admiralty of England and Ireland, or either of such jurisdictions as used in any *Act of Parliament*; and for the purpose of arresting any person charged with an offence declared by this Act to be within the jurisdiction of the Admiral, the territorial waters adjacent to the United Kingdom, or any other part of Her Majesty's dominions, shall be deemed to be within the jurisdiction of any judge, magistrate, or officer having power within such United Kingdom, or

"Jurisdiction of the Admiral".

other part of Her Majesty's dominions, to issue warrants for arresting or to arrest persons charged with offences committed within the jurisdiction of such judge, magistrate, or officer:

"United Kingdom".

"United Kingdom" includes the Isle of Man, the Channel Islands, and other adjacent islands:

"Territorial waters of Her Majesty's dominions".

"The territorial waters of Her Majesty's dominions", in reference to the sea, means such part of the sea adjacent to the coasts of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial Sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions:

"Governor".

"Governor", as respects India, means the Governor-General or the Governor of any presidency; and where a British possession consists of several constituent colonies, means the Governor-General of the whole possession or the Governor of any of the constituent colonies; and as respects any other British possession, means the officer for the time being administering the government of such possession; also any person acting for or in the capacity of Governor shall be included under the term "Governor":

"Offence".

"Offence" as used in this Act means an act, neglect, or default of such a description as would, if committed within the body of a county in England, be punishable on indictment according to the law of England for the time being in force:

"Ship".

"Ship" includes every description of ship, boat, or other floating craft:

"Foreign ship".

"Foreign ship" means any ship which is not a British ship.

THE WHIPPING ACT.

(Act No. IV of 1909.)

An Act to consolidate and amend the law relating to the punishment of whipping.

Whereas it is expedient to consolidate and amend the law relating to the punishment of whipping; It is hereby enacted as follows:—

Short title and extent.

1. (*1*) This Act may be called the Whipping Act, 1909; and

(*2*) It extends to the whole of British India, inclusive of British Baluchistan and the Santhal Parganas.

Whipping added to *punishments* described in Act XLV 1860.

2. In addition to the punishments described in s. 53 of the Indian Penal Code, offenders are also liable to the punishment of whipping.

NOTE.

The Indian Penal Code and the Code of Criminal Procedure must be read as if the Whipping Act formed a part of the Penal Code from the date of its enactment[1].

Offences punishable with whipping in lieu of other punishment.

3. Whoever commits any of the following offences, namely:—

(*a*) theft, as defined in s. 378 of the Indian Penal Code, other than theft by a clerk or servant of property in possession of his master;

(*b*) theft in a building, tent or vessel, as defined in s. 380 of the said Code;

(*c*) theft after preparation for causing death or hurt, as defined in s. 382 of the said Code;

(*d*) lurking house-trespass, or house-breaking, as defined in sections 443 and 445 of the said Code, in order to the committing of any offence punishable with whipping under this section;

(*e*) lurking house-trespass by night, or house-breaking by night, as defined in sections 444 and 446 of the said Code, in order to the committing of any offence punishable with whipping under this section;

may be punished with whipping in lieu of any punishment to which he may for such offence be liable under the said Code.

NOTE.

When punishment is inflicted under this Act, the charge must state the liability, and the judgment should set out the grounds thereof[2].

1 *Maniruddin* v. *Gaur Chandra Shamadar*, (1871) 7 Beng. L. R. 165, F. B.; (1870) 5 M. H. C. App. 18.

2 *Badiya*, (1882) 5 Mad. 158.

Under this section the offender in lieu of punishment provided by the Penal Code may be punished with whipping. The punishment under the Penal Code cannot be inflicted in addition to whipping[1]. Under the next section the offender may be punished with whipping in lieu of or in addition to any other punishment to which he may be liable.

Offences punishable with whipping in lieu of or in addition to other punishment.

4. Whoever—

(a) abets, commits or attempts to commit, rape, as defined in s. 375 of the Indian Penal Code;

(b) compels, or induces any person by fear of bodily injury, to submit to an unnatural offence as defined in s. 377 of the said Code,

(c) voluntarily causes hurt in committing or attempting to commit robbery, as defined in s. 390 of the said Code;

(d) commits dacoity as defined in s. 391 of the said Code;

may be punished with whipping in lieu of or in addition to any other punishment to which he may, for such offence, abetment or attempt be liable under the said Code.

NOTE.

This section must be read subject to ss. 391 and 393 of the Code of Criminal Procedure Under the former section no accused person shall be sentenced to whipping in addition to imprisonment when the term of imprisonment to which he is sentenced is less than three months. Under the latter section certain exemptions are specified.

Juvenile offenders when punishable with whipping.

5. Any juvenile offender who abets, commits or attempts to commit—

(a) any offence punishable under the Indian Penal Code, except offences specified in Chapter VI and in sections 153A and 505 of that Code and offences punishable with death, or

(b) any offence punishable under any other law with imprisonment which the Governor-General in Council may, by notification in the Gazette of India, specify in this behalf,

may be punished with whipping in lieu of any other punishment to which he may for such offence, abetment or attempt be liable.

Explanation.—In this section the expression "juvenile offender" means an offender whom the Court, after making such enquiry (if any) as may be deemed necessary, shall find to be under sixteen years of age, the finding of the Court in all cases being final and conclusive.

NOTE.

This section is not intended to override the provisions of ss. 3 and 4 which apply to juvenile offenders, but these sections specify certain offences only for which whipping may be inflicted; but under this section a juvenile offender may be punished with whipping for an offence mentioned in clauses (a) and (b)

The sentence of whipping under this section may be passed in lieu of and not in addition to any other punishment to which the accused may be reliable.

[1] *Dagadu*, (1891) 16 Bom. 357.

The following notice has been issued by the Governor-General in Council in pursuance of clause (*b*)—

No. 1008.—*In exercise of the powers conferred by s. 5, clause (b), of the Whipping Act, 1909 (IV of 1909), and in supersession of the Home Department Notification No. 1650, dated September 27, 1920, the Governor General in Council is pleased to specify the offences under the enactments and rules mentioned in the schedule hereto annexed, being offences punishable under the said enactments and rules with imprisonment, as offences for the abetment or commission of, or attempt to commit which, juvenile offenders may be punished with whipping in accordance with the provisions of the said section.*

SCHEDULE.

General Acts.

1. The Police Act, 1861 (V of 1861) section 34.
2. The Public Gambling Act, 1867 (III of 1867), sections 4, 13, and 15.
3. The Cattle Trespass Act, 1871 (I of 1871), section 24.
4. The Northern India Canal and Drainage Act, 1873 (VIII of 1873) section 70, clauses (1) and (2).
5. The Opium Act, 1878 (I of 1878), section 9.
6. The Indian Forest Act, 1878 (VII of 1878), sections 25, 32 and 62 and rules made under section 41, for the infringement of which imprisonment is prescribed as a penalty.
7. The Indian Arms Act. 1878 (XI of 1878), sections 19, 20, 22 and 23.
8. The Indian Salt Act, 1882 (XII) of 1882), sections 9 and 10.
9. The Indian Telegraph Act, 1885 (XIII of 1885), sections 24 and 25.
10. The Indian Railways Act, 1890 (IX of 1890), sections 126, 127, 128 and 129.
11. The Prevention of Cruelty to Animals Act, 1890 (XI of 1890), sections 3, 4 and 5.
12. The Prisons Act, 1894 (IX of 1894), section 42.
13. The Excise Act, 1896 (XII of 1896), sections 45, 46 49, and 51.
14. The Indian Fisheries Act, 1897 (IV of 1897), sections 4 and 5.
15. The Reformatory Schools Act, 1897 (VIII of 1897), sections 27 and 28.
16. The Indian Post Office Act, 1898 (VI of 1898), sections 61, 62 and 68.
17. The Ancient Monuments Preservation Act, 1904 (VII of 1904), section 16.
18. The Indian Electricity Act, 1910 (IX of 1910), section 40.
19. The Criminal Tribes Act, 1911 (III of 1911), sections 21 ,and 22 and 24.
20. The Cantonment Code, 1912, s. 67 (i).

LOCAL ACTS.

Madras.

1. The Madras District Police Act, 1859 (XXIV of 1859), section 47.
2. The Madras Forest Act, 1882 (Madras Act V of 1882), sections 21, 28 and 50 and rules made under sections 26 and 35, for the infringement of which imprisonment is prescribed as a penalty.
3. The Madras Abkari Act, 1886 (Madras Act I of 1886) sections 55 and 58.
4. The Madras City Police Act 1888, (Madras Act III of 1888), sections 46, 53, 64, 65, 67, 68, 71, 72 and 75.
5. The Towns Nuisances Act, 1889 (Madras Act III of 1889), sections 3, 5 and 7.
6. The Madras Salt Act, 1889 (Madras Act IV of 1889), sections 74.

Bombay.

1. The Bombay Abkari Act, 1878 (Bombay Act V of 1878), sections 43 and 48.
2. The Bombay Prevention of Gambling Act, 1887 (Bombay Act IV of 1887), sections 5 and 12.
3. The Bombay District Police Act, 1890 (Bombay Act IV of 1890), sections 62, 70 and 71.
4. The City of Bombay Police Act, 1902 (Bombay Act IV of 1902), section 122.

Bengal.

1. The Howrah Offences Act, 1857 (XXI of 1857), section 20.
2. The Calcutta Suburban Police Act, 1866 (Bengal Act II of 1866), section 41.
3. The Calcutta Police Act, 1866 (Bengal Act IV of 1866,) section 68.
4. The Bengal Public Gambling Act, 1867 (Bengal Act II of 1867) sections 4, 11 and 13.
5. The Bengal Irrigation Act, 1876 (Bengal Act III of 1876), section 93.
6. The Bengal Embankment Act, 1882 (Bengal Act II of 1882), section 77.
7. The Bengal Excise Act, 1909 (Bengal Act V of 1909, sections 46 and 52.

United Provinces.

1. The United Provinces Excise Act, 1910, (United Provinces Act IV of 1910), sections 60, causes (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), (*h*), (*i*) and 63.

1 Notification No. 1008, Home Department Judicial, dated June 6, 1921, *Gazette of India* June 18, 1921, Part I, p. 872.

Punjab.

1. The Punjab Land Preservation (Chos).

Burma

Act V of 1917),sections 30, 31, 32, 33 and 34.

Behar and Orissa.

1. The Bengal Embankment Act, 1855 XXXII of 1855), sections 10 and 17.

2. The Bengal Embankment Act, 1882 (Bengal Act II of 1882), section 77.

3. The Bihar and Orissa Excise Act, 1915 (Bihar and Orissa Act II of 1915), sections 47 and 55.

Central Provinces.

1. The Central Provinces Excise Act, 1915 (Central Provinces Act II of 1915), sections 34, clauses (*a*), (*b*) (*c*) (*d*), (*f*) (*g*) (*h*) and 36.

Delhi.

1. Section 61, sub-section (1) clauses (*a*)

dated October 30, 1915.

Special provision as to punishment with whipping in frontier districts.

6. Whenever any Local Government has, by notification in the Official Gazette, declared the provisions of this section to be in force in any frontier district or any wild tract of country within the jurisdiction of such Local Government, any person who in such district or tract of country after such notification as aforesaid commits any offence punishable under the Indian Penal Code with imprisonment for three years or upwards, may be punished with whipping in lieu of any other punishment to which he may be liable under the said Code.

Amendment of section 392, Act V, 1898.

7. To section 392, sub-section (2), of the Code of Criminal Procedure, 1898, the words "and, in the case of a person under sixteen years of age, it shall not exceed fifteen stripes" shall be added.

8. [*Repealed by Act XVII of 1914.*]

THE SCHEDULE.

[*Repealed by Act XVII of 1914.*]

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*** The figures refer to sections and pages or to pages only.*